Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

NOLAN P. GREEN, ROBERT L. BARNES, HENRY A. MAGYARI, DANIEL C. MAHONEY, FOREST W. MEADOR, EARL A. POWE, TIMOTHY T. RYAN, JOSHUA L. SHELHART, JEREMY R. STARK, & TERRENCE D. L. STERNE

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When the government relies entirely on a permissive inference to prove a drug use offense, does due process require that the relationship between the proven facts and inferred facts exist beyond a reasonable doubt?

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PETITION FOR WRIT OF CERTIORARI

Nolan P. Green, Robert L. Barnes, Henry A. Magyari, Daniel C. Mahoney, Forest W. Meador, Earl A. Powe, Timothy T. Ryan, Joshua L. Shelhart, Jeremy R. Stark, and Terrence D. L. Sterne petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Armed Forces in their respective cases.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Armed Forces in *United States v. Green*, 55 M.J. 76 (2001), is located in Appendix A at 1a-26a. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals is located in Appendix B at 27a-31a. The unpublished order of the United States Court of Appeals for the Armed Forces in *United States v. Barnes* is located in

Appendix C at 32a-35a. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals is located in Appendix D at 36a-48a. The unpublished order of the United States Court of Appeals for the Armed Forces in *United States v. Magyari*, is located in Appendix E at 49a-50a. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals is located in Appendix F at 51a-57a. The unpublished order of the United States Court of Appeals for the Armed Forces in *United States v. Mahoney*, is located in Appendix G at 58a-59a. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals is located in Appendix H at 60a-66a. The unpublished order of the United States Court of Appeals for the Armed Forces in *United States v. Meador*, is located in Appendix I at 67a-68a. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals is located in Appendix J at 69a-75a. The unpublished order of the United States Court of Appeals for the Armed Forces in *United States v. Powe*, is located in Appendix K at 76a-77a. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals is located in Appendix L at 78a-90a. The unpublished order of the United States Court of Appeals for the Armed Forces in *United States v. Ryan*, is located in Appendix M at 91a-92a. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals is located in Appendix N at 93a-96a. The unpublished order of the United States Court of Appeals for the Armed Forces in *United States v. Shelhart*, is located in Appendix O at 97a-98a. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals is located in Appendix P at 99a-104a. The unpublished order of the United States Court of Appeals for the Armed Forces in *United States v. Stark*, is located in Appendix Q at 105a-106a. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals is located in Appendix R at 107a-114a. The unpublished order of the United States Court of Appeals for the Armed Forces in *United States v. Sterne*, is

located in Appendix S at 115a-116a. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals is located in Appendix T at 117a-123a.

JURISDICTION

The lower court granted review of Petitioner Green's case and affirmed his conviction for wrongful drug use on June 11, 2001. He invokes this Court's jurisdiction under 28 U.S.C. § 1259(3). The remainder of the petitioners' cases were sent to the United States Court of Appeals for the Armed Forces by order of the Judge Advocate General of the Navy after the United States Navy-Marine Corps Court of Criminal Appeals reversed their convictions. *See* Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2). After deciding *United States v. Green*, the lower court reversed these cases and remanded them to the United States Navy-Marine Corps Court of Criminal Appeals. These petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1259(2).

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The Fifth Amendment provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

Article 51(c), UCMJ, 10 U.S.C. § 851(c), provides:

> (4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.

Article 112a, UCMJ, states in relevant part:

> (a) Any person subject to this chapter who wrongfully uses . . . a substance described in subsection (b) shall be punished as a court-martial may direct.

The elements of wrongful drug use, Article 112a, UCMJ, 10 U.S.C. § 912a, and definitions of those elements are found in Manual for Courts-Martial (M.C.M.), United States (1998 ed.), Part IV, ¶ 37(b-c), and are reprinted in relevant part in Appendix U.

STATEMENT OF THE CASE

1. The Navy, Marine Corps, Army, and Air Force conduct over 2,200,000 urinalysis tests annually. Of those, about 14,000 test positive for the presence of an illegal drug. One such sample, taken from petitioner Green in 1997, tested positive for the cocaine metabolite benzoylecgonine (BZE). Based on this test, the United States Marine Corps prosecuted Green in a court-martial for the wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2000).

Green pled not guilty in a bench trial. The government relied solely on the results of the positive urinalysis. The evidence consisted of a written laboratory report and testimony from a forensic chemist. The chemist described the laboratory's procedures and explained the test results. Green's urine sample contained 213 nanograms per milliliter (ng/ml) of the cocaine metabolite benzoylecgonine (BZE). The government cut-off level for reporting a positive test for BZE is 100 ng/ml. The government produced no eye-witnesses or other evidence indicating that Green knowingly and wrongfully used cocaine. In his defense, Green called witnesses who testified to his good military character. The military judge convicted Green despite his pleas,[1] and

[1] The judge also convicted Green of unauthorized absence (AWOL), in violation of Art. 86, UCMJ, 10 U.S.C. § 886 (2000), and a second charge of wrongfully using cocaine. The Navy-Marine Corps Court of Criminal Appeals affirmed the AWOL charge and set aside the second charge of cocaine use because the evidence was factually insufficient. These two charges were not at issue before the Court of Appeals for the Armed Forces and are not at issue here.

sentenced him to 68 days of confinement, reduction to the lowest enlisted pay-grade, and separation from the naval service with a bad-conduct discharge.

On appeal before the United States Navy-Marine Corps Court of Criminal Appeals, Green challenged the legal sufficiency of the evidence. Specifically, Green relied upon the United States Court of Appeals for the Armed Forces decision in *United States v. Campbell*, 50 M.J. 154 (1999), which stated that the government must prove more than the mere presence of the drug metabolite to show knowing and wrongful use. The government had to offer some evidence that:

> the [drug] cutoff level and the reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have experienced the physical and psychological effects of the drug[.]

Campbell, 50 M.J at 160 (internal quotes omitted). Despite the lack of such evidence in Green's case, the United States Navy-Marine Corps Court of Criminal Appeals rejected Green's appeal and affirmed the conviction, finding the evidence sufficient. *United States v. Green*, No. 99-0162, slip op. at 2-3 (N-M. Ct. Crim. App. Feb. 10, 2000).

2. Shortly after the court's decision in Green, the United States Court of Appeals for the Armed Forces reconsidered and reaffirmed its original decision in *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000). The Navy-Marine Corps Court of Criminal Appeals then began to reverse convictions, including the other nine petitioners in this case. All of these cases involved low level positive urinalyses without direct evidence of knowing and wrongful use.

3. Green appealed his affirmance to the United States Court of Appeals for the Armed Forces. The Judge Advocate General of the Navy certified to the Court of Appeals for the Armed Forces the other petitioners' cases that were reversed. Before the Court of Appeals for the Armed Forces, the petitioners argued that the government could not constitutionally rely upon a positive urinalysis test and accompanying expert explanation in order to receive the benefit of a permissive inference that the petitioners had knowingly and wrongfully used illegal drugs. Instead, petitioners claimed that if the government relied only on the permissive inference to establish knowing and wrongful use, then the inferred elements had to flow from the proven facts beyond a reasonable doubt. Such an argument was consistent with the Court of Appeals for the Armed Forces decision in *Campbell, supra*, and with this Court's decision in *Barnes v. United States*, 412 U.S. 837 (1973).

In petitioner Green's case, the Court of Appeals for the Armed Forces restricted and modified its holding in *Campbell*. Specifically, the court relieved the government of having to disprove innocent ingestion, of showing that a servicemember felt a drug's physiological or psychological effects, or of demonstrating that a drug user in general would have felt the drug's effects. *Green*, 55 M.J. at 85 (Sullivan, J., concurring). Instead, the government's evidence of a positive urinalysis and explanatory expert testimony was legally sufficient to sustain Green's conviction for drug use.

Judge Gierke dissented. He wrote that the majority had turned Article 112a into a strict-liability offense. *Green*, 55 M.J. at 85 (Gierke, J., dissenting). In doing so, Judge Gierke believed that the court had offended the Due Process Clause by allowing a court-martial to convict an accused of a felony drug offense based solely on the presence of the drug metabolite in the accused's body. *Id.* at 87.

The Court of Appeals for the Armed Forces reversed and remanded the remaining petitioners' cases to the Navy-Marine Corps Court of Criminal Appeals for further consideration in light of its decision in petitioner Green's case.

REASONS FOR GRANTING THE PETITION

1.a. The court of appeals diluted the burden of proof by affirming petitioners' convictions with inferences that failed to prove guilt beyond a reasonable doubt. This Court has drawn a careful distinction between mandatory and permissive inferences depending on their role in the jury's deliberative process. Mandatory inferences, which allow the government to "rest its case entirely on a presumption," are permitted only if "the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." *County Court v. Allen*, 442 U.S. 140, 167 (1979). Permissive inferences, on the other hand, need only a "more likely than not" or "rational" relationship between inferred and proven facts, as the government must rely on other evidence and the record as a whole to surpass reasonable doubt. *Id.* This Court has not yet addressed whether the rational relationship test satisfies due process when "proof of the crime charged or an essential element thereof depends upon its use." *Leary v. United States*, 395 U.S. 6, 36 n.64 (1969); THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, at 1764-65 (Congressional Research Service 1996 ed.).

These cases present the opportunity to answer this important constitutional question. The court of appeals applied a rational relationship test in deciding whether the inferences of use and wrongfulness satisfied proof beyond a reasonable doubt. It did so implicitly by relying on past precedent to validate the inferences in *United States v. Green*. Appendix A at 29a (citing, in part, *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986)).

b. The use of a rational connection test was error. Due process requires in these cases that the relationship between the proven fact and inferred facts exist beyond a reasonable doubt. Appendix A at 22a (Gierke, J., dissenting). The inferences used for Article 112a offenses allow fact-finders to infer guilt on every element of the offense—the element of use can be inferred from presence of a drug metabolite in one's urine and the elements of knowledge and wrongfulness can be inferred from use. *See Id.* and Appendix U; *Harper*, 22 M.J. at 161-62. In this context, the inferences drawn are like mandatory inferences in that the prosecution's case rests "entirely on a presumption." *Allen*, 442 U.S. at 167. As such, the same beyond a reasonable doubt standard used for mandatory inferences should apply to the inferences used in Article 112a offenses.

This relationship does not exist in this case. Here, the proven fact—drug metabolites were found in petitioners' urine and were not naturally produced by their bodies—did not rationally establish beyond a reasonable doubt that they knowingly and wrongfully used narcotics. There could be many reasons why their urine tested positive. The samples could have been tainted with urine from another sample during the testing process. The petitioners could have been victims of someone placing the drug in their food or drink. Moreover, without testimony that they were on notice of the drugs' presence, the fact-finder could not rationally conclude that petitioners knew or should have known that drugs were in their systems or that they were doing an illegal act—the very basis for allowing permissive inferences. *See United States v. Ford*, 23 M.J. 331, 337 (C.M.A. 1987); *see also Barnes*, 412 U.S. at 845.

2. The lower court also erred by not requiring some evidence of knowledge or wrongfulness to support an inference of these elements. It affirmed petitioner Green and the other petitioners' convictions based on positive urinalyses,

expert testimony that drug metabolites were not naturally produced by the human body, and evidence that positive urinalyses generally resulted from drug ingestion a drug. Appendix A at 11a. Although the court in *Green* stated that these facts permit an inference of knowing and wrongful use, *Id.*, these facts relate to neither element. On the contrary, they relate only to the element of use.

The failure to produce sufficient evidence from which to infer certain elements constitutes error, and is reversible error in many circuits. For example, in *United States v. Jenkins*, 90 F.3d 814, 820 (3rd Cir. 1996), the government relied on the defendant's proximity to the drug to invoke an inference that he had dominion and control of the drug. The Third Circuit Court of Appeals reversed the conviction, holding that a defendant's physical distance from a drug is not sufficient to permit a reasonable jury to infer dominion and control beyond a reasonable doubt. *Id.* Likewise, in *United States v. Jones*, 44 F.3d 860, 865 (10th Cir. 1995), the Tenth Circuit Court of Appeals overturned a conviction where the government sought the benefit of a permissive inference of a conspiracy agreement based solely on the proven fact that the defendant knew drugs were present in a vehicle in which she was traveling. Specifically, the court stated that "mere knowledge that drugs are present in the vehicle, without additional evidence to support a reasonable inference of knowing agreement to distribute them is insufficient to sustain a conspiracy conviction." *See also*, *United States v. Littrell*, 574 F.2d 828 (5th Cir. 1978) (holding that association with an individual involved in a criminal scheme alone is insufficient to prove knowing participation in the conspiracy).

Military precedent, prior to the lower court's decision in *Green*, also required some additional evidence of knowledge to support an inference. Appendix A at 22a-23a (Gierke, J., dissenting). Typically, this evidence included expert testimony that ruled out the possibility of innocent ingestion and

indicated that the accused felt the physiological effects of the drugs. Such evidence served two important purposes to satisfy due process. First, it notified a person that he or she was under the influence of narcotics. *See Ford*, 23 M.J. at 337; *United States v. Grier*, 6 U.S.C.M.A. 218, 223, 19 C.M.R. 344, 349 (1959). These "recognizable effects" allow fact-finders to infer that an "appellant knew what he was doing." *See Harper*, 22 M.J. at 163 (citations omitted). It also gives him the opportunity to defend against the charges. *See Ford*, 23 M.J. at 337 (citing *Barnes*, 412 U.S. at 845) (discussing evidence of knowing use is great where person who knowingly feels the effects of a drug cannot satisfactorily explain its presence).

3. The court of appeals' decision raises matters of critical importance to the military justice system. In 1999, the Navy, Marine Corps, Army, and Air Force conducted approximately 2.2 million urinalyses that resulted in more than 14,000 positive results. *Drug Use in the Military*, NAVY TIMES, June 26, 2000, at 16. The United States Navy and Marine Corps accounted for over one-half of these tests and positive results, and they convened 1,167 courts-martial for drug related offenses. *Id.* The dilution of the beyond a reasonable doubt standard will greatly impact the rights of sailors and Marines in these courts-martial. It may deprive them of their careers, livelihood, and liberty. *United States v. Campbell*, 50 M.J. 154, 160 (1999). For these reasons, this Court should grant review.

Military defendants, like civilian defendants, are entitled to the protection of proof beyond a reasonable doubt in criminal trials. *See United States v. Czekala*, 42 M.J. 168, 170 (1995) (citing *In re Winship*, 397 U.S. 358, 363-64 (1970)); Art. 51, UCMJ, 10 U.S.C. § 851 (2000). Neither the Fifth Amendment nor military rules provide an exception for basic proof requirements based on the type of offense. A conviction for an offense cannot be sustained "except upon proof beyond a

reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364. This Court should grant review to prevent the lower court's dilution of the bedrock principle of proof beyond a reasonable doubt.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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September 2001

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 00-0268

Crim.App. No. 99 00162

Nolan P. GREEN, Sergeant
U.S. Marine Corps, *Appellee*

v.

United States, *Appellant*

Argued Oct. 3, 2000
Decided Jun. 11, 2001

For Appellee: *Lieutenant M. Eric Eversole*, JAGC, USNR (argued).
For Appellant: *Lieutenant William C. Minick*, USNR (argued); *Lieutenant Colonel Marc W. Fisher, Jr.*, USMC, and *Lieutenant Commander Philip L. Sundel*, JAGC, USNR (on brief); *Colonel Kevin M. Sandkuhler*, USMC, and *Commander Eugene E. Irvin*, JAGC, USN.

Opinion of the Court

EFFRON, Judge:

A special court-martial composed of a military judge sitting alone convicted appellant, contrary to his pleas,

of one specification of unauthorized absence and two specifications of wrongful use of cocaine, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 USC §§ 886 and 912a, respectively. He was sentenced to a bad-conduct discharge, confinement for 68 days, and reduction to the lowest enlisted grade. The convening authority approved these results. In an unpublished opinion, the Court of Criminal Appeals modified the findings, reassessed the sentence, and affirmed only the bad-conduct discharge and reduction to the lowest enlisted grade.[1]

On appellant's petition, we agreed to review whether the evidence of appellant's positive urinalysis provided a legally sufficient basis to sustain his conviction for wrongful use of cocaine.[2] For the reasons set forth below, we affirm.

---

[1] The court dismissed one of the specifications of wrongful use of cocaine on the ground of factual insufficiency and affirmed the remaining findings of guilty. The dismissed specification was based upon a urinalysis sample that is not at issue in the present appeal.

[2] We granted review of the following issues assigned by appellant:

I. WHETHER THE LOWER COURT ERRED BY IGNORING THIS COURT'S DECISION IN UNITED STATES V. CAMPBELL, 50 M.J. 154 (1999), AS BINDING PRECEDENT.

II. WHETHER APPELLANT'S CONVICTION FOR WRONGFUL USE OF COCAINE WAS FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE THE PROSECUTION FAILED TO ESTABLISH THE PREDICATE FACTS NECESSARY TO SUSTAIN A PERMISSIVE INFERENCE.

III. WHETHER THE LOWER COURT'S DECISION TO AFFIRM APPELLANT'S CONVICTION FOR WRONGFUL USE OF COCAINE, WITHOUT EXPERT TESTIMONY CONCERNING THE PHYSIOLOGICAL EFFECTS, VIOLATED THE DUE PROCESS CLAUSE.

I. FACTUAL BACKGROUND

Upon returning from a lengthy period of leave, appellant provided a urine sample for a command-directed urinalysis, the results of which were positive for the cocaine metabolite benzoylecgonine (BZE). At trial, the Government introduced evidence concerning the urinalysis. The evidence, which consisted of a laboratory report and testimony of a witness from the laboratory who appeared "as an expert in the field of forensic chemistry," was admitted with no defense objection. The report reflected the chain of custody of the urinalysis sample and the positive result of the urinalysis.

The expert witness, a senior chemist at the Navy Drug Screening Laboratory in Jacksonville, Florida, described the laboratory's procedures and explained the results of the urinalysis. The witness testified that there had been three tests of appellant's sample. First, an immunoassay test was used to screen samples for seven different kinds of drugs. When this yielded a positive result for BZE, a second or "rescreen" test was performed, which also yielded a positive result. The laboratory then conducted a third test, known as a "confirmation test," using gas chromatography/mass spectrometry (GC/MS) technology, which the witness described as "a very sophisticated state-of-the-art test that does give you a specific identification of a specimen." The witness testified that the GC/MS analysis of appellant's sample revealed 213 nanograms per milliliter (ng/ml) of BZE in appellant's urine. The laboratory report noted that the reading of 213 ng/ml of BZE in appellant's urine was "an amount greater than the DoD [Department of Defense] GC-MS cut-off standard of 100 ng/ml."

The expert witness also stated:

> The only way a person can produce a urine sample that has Benzoylecgonine is for cocaine to pass through the body. In order for that person to produce that urine sample, that person would have to use the cocaine.

When trial counsel asked whether a positive result might occur "from the use of any medications, prescription medications," the witness replied:

> To my knowledge, cocaine is not used as a prescription drug. I don't even believe it is used in the surgical setting. It used to be used years ago. There will be no other drugs that could cause a positive result for cocaine. It has to be cocaine itself. To my knowledge, the only place you can get it now is pretty much on the street clandestinely.

On cross-examination, the expert witness acknowledged that BZE could be detected through urinalysis if someone put cocaine into the sample directly, outside the body. Additionally, he testified that a reading of 213 ng/ml is "on the low end of positive results." He added: "A lot of times we see samples of 100,000 nanograms or higher."

Although appellant did not testify, he offered a defense based on his good military character through the testimony of other witnesses. His primary contention was that it would have been illogical for a person of appellant's character and experience to have used cocaine. The defense also raised questions about the chain of custody, a matter not at issue in the present

appeal, to suggest that the urine that had tested positive for BZE belonged to someone other than appellant. He did not affirmatively claim innocent or unknowing ingestion.

II. DISCUSSION

To obtain a conviction under Article 112a for wrongful use of a controlled substance, the prosecution must prove:

(a) That the accused used a controlled substance; and

(b) That the use by the accused was wrongful.

Para. 37b(2), Part IV, Manual for Courts-Martial, United States (2000 ed.). The Manual also provides:

> Knowledge of the presence of the controlled substance is a required component of [wrongful] use. Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge.

Para. 37c(10), Part IV; *see also* Analysis of Punitive Articles, Manual, *supra* at A23-12, citing *United States v. Mance*, 26 M.J. 244 (CMA 1988); *United States v. Ford*, 23 M.J. 331 (CMA 1987); and *United States v. Harper*, 22 M.J. 157 (CMA 1986).

The "wrongful" element in Article 112a, which has been the source of extensive interpretative litigation, represents the considered judgment of Congress as to the nature of the offense. Because the statute does not have the clarity of a bright line rule, *compare, e.g.*, Art. 111(2), UCMJ, 10 USC § 911(2) (making it an offense to drive with a blood alcohol level of "0.10 grams"), there has been significant litigation concerning its meaning. *Harper* and its progeny reflect the challenge of interpreting the statute in a manner that appropriately balances disciplinary considerations, the rights of servicemembers, and evolving legal standards concerning admissibility of expert evidence.

Appellant contends that the evidence in his case was insufficient to prove wrongful use, citing our opinion in *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000). The accused in *Campbell* was charged with wrongful use of LSD based solely upon a positive urinalysis that employed a novel scientific procedure. At trial, defense counsel moved to exclude evidence of the urinalysis and the supporting expert testimony on the grounds that the test at issue did not meet the standards of reliability required by Mil. R. Evid. 702, Manual, *supra*, and applicable case law. The motion was denied by the military judge, and the accused was convicted on the basis of the urinalysis results and related testimony.

On appeal, we determined that the military judge erred in admitting the LSD test results, in view of "the absence of evidence establishing the frequency of error and the margin of error in the testing process" with respect to the novel scientific procedure. 52 M.J. at 388. The identification of deficiencies in the reliability of the test rendered the urinalysis evidence inadmissible

and, in the absence of other evidence, resulted in reversal of the case due to insufficient evidence. This aspect of the opinion underscored the importance of a careful inquiry into the reliability of novel scientific evidence.

After addressing the issue necessary to resolve the case, our opinion in *Campbell* ventured beyond the issue of reliability of the methodology in an effort to provide additional guidance concerning proof in urinalysis cases. In that context, we described a three-part approach to consideration of urinalysis results. *Id.* In our opinion upon reconsideration, we emphasized that the three-part approach did not establish a mandatory standard. *Id.* We noted that other evidence explaining the test results could be admissible if it met applicable reliability and relevance standards for scientific and specialized knowledge with respect to providing a rational basis for inferring knowing, wrongful use. *Id.* at 388-89.

The court below in the present case, and in the later cases certified to us by the Judge Advocate General, conscientiously endeavored to apply the broad guidance we fashioned in Campbell. *See, e.g., United States v. Barnes*, 53 M.J. 624 (N.M.Ct.Crim.App. 2000), set aside, M.J. (Daily Journal June 11, 2001). Our consideration of the decisions of the lower courts, however, has led to further questions concerning matters such as the relationship between admissibility of novel scientific evidence and sufficiency of proof on the merits; consideration of the permissive inference of knowing use with respect to admissibility of novel scientific evidence; the role of judicial notice; and the effect of waiver or forfeiture. These questions indicate that we should give fresh attention in the present case to

the applicable principles governing litigation of urinalysis cases.

Under our case law, where scientific evidence provides the sole basis to prove the wrongful use of a controlled substance, "expert testimony interpreting the tests or some other lawful substitute in the record is required to provide a rational basis upon which the factfinder may draw an inference that [the controlled substance] was [wrongfully] used." *United States v. Murphy*, 23 M.J. 310, 312 (CMA 1987). The admissibility of such evidence is subject to applicable rules governing opinions and expert testimony. *See, e.g.*, Mil. R. Evid. 702; *United States v. Bush*, 47 M.J. 305 (1997); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993) (scientific testimony must be both reliable and relevant); *General Electric Co. v. Joiner*, 522 U.S. 136, 144-45, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997) (an expert's opinions must be "sufficiently supported" by the "studies on which they purport[] to rely"); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 153-55, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999) (admissibility depends not only on the general reasonableness of an expert's approach but also on the particular matter to which the expert's testimony was directly relevant).

The military judge has broad discretion as the "gatekeeper" to determine whether the party offering expert testimony has established an adequate foundation with respect to reliability and relevance. *See id.* at 142; *Bush*, *supra* at 310. The military judge, as gatekeeper, may determine in "appropriate circumstances" that the test results, as explained by the expert testimony, permit consideration of the permissive inference that presence

of the controlled substance demonstrates knowledge and wrongful use. *See Mance*, 26 M.J. at 256. In making this determination, the military judge may consider factors such as whether the evidence reasonably discounts the likelihood of unknowing ingestion, or that a human being at some time would have experienced the physical and psychological effects of the drug, but these factors are not mandatory. *Compare, e.g., Harper*, 22 M.J. at 157, and *Ford*, 23 M.J. 331, *with United States v. Thompson*, 34 M.J. 287 (CMA 1992).

In the context of the permissive inference, the military judge has discretion to determine the issue of admissibility by considering whether: (1) the metabolite is naturally produced by the body or any substance other than the drug in question; (2) the permissive inference of knowing use is appropriate in light of the cutoff level, the reported concentration, and other appropriate factors; and (3) the testing methodology is reliable in terms of detecting the presence and quantifying the concentration of the drug or metabolite in the sample. We emphasize, however, that this three-part approach is not exclusive, and the military judge as gatekeeper may consider other factors, so long as they meet applicable standards for determining the admissibility of scientific evidence.[3] Given the unique aspects of drug prosecutions in the armed forces and the serious consequences of a positive urinalysis, the

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[3] Judge Sullivan seeks greater clarity on this important subject. As noted earlier, however, Congress has not employed a bright line rule. In view of the emphasis in this opinion on the broad discretion of the military judge as to matters that may be considered in his or her gatekeeper role in assessing the relationship between expert testimony and the presumption of knowing use, this opinion does not adopt the interpretative gloss suggested in Judge Sullivan's separate opinion.

military judge must ensure a careful and thorough Daubert-type analysis in such cases. *See, e.g., United States v. Bush*, 44 M.J. 646, 649-52 (A.F.Ct.Crim.App. 1996), *aff'd*, 47 M.J. 305 (1997) (describing the detailed inquiry conducted by the military judge prior to admitting evidence of novel scientific evidence testing the presence of cocaine through hair analysis).[4] When the military judge is considering evidence of a test that does not involve a novel scientific procedure, different considerations apply. If the expert testimony has "an established scientific, technical, legal, judicial, or evidentiary foundation" regarding reliability and relevance, it may be appropriate to take judicial notice under Mil. R. Evid. 201 without further litigation. *See* Stephen A. Saltzburg, et al., *Military Rules of Evidence Manual* 841 (4th ed. 1997). Moreover, if a party fails to challenge the admissibility of expert testimony, the issue may be treated as waived, absent plain error. Mil. R. Evid. 103(a)(1) and (d); *see Saltzburg*, et al., *supra* at 840-41.

If the military judge determines that the scientific evidence -- whether novel or established -- is admissible, the prosecution may rely on the permissive inference during its case on the merits. A urinalysis properly admitted under the standards applicable to

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[4] Judge Gierke contends that this opinion transforms Article 112a into an "absolute-liability offense," permits a conviction based upon "the mere presence of a drug metabolite in the body," M.J. at (1), and transforms the Daubert-type analysis. M.J. at (5). The present opinion does not adopt such a position. What the military judge must determine is whether the expert's testimony supports the matter to which it is relevant; that is, does the expert's testimony permit reliance on a permissive inference of knowing use. See Kumho Tire, 526 U.S. at 153-58.

scientific evidence, when accompanied by expert testimony providing the interpretation required by *Murphy*, *supra*, provides a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use, without testimony on the merits concerning physiological effects. *See United States v. Bond*, 46 M.J. 86, 89 (1997). To the extent that the prosecution, as a matter of trial tactics, includes in its case on the merits other evidence, such as testimony concerning physiological effects, it is the responsibility of the factfinder to determine what weight should be given to such evidence. *Id.* at 89-90.

In contrast to the accused in Campbell, appellant did not move at trial to exclude the test results or the expert testimony. This evidence, as summarized in Part I, supra, is sufficient to support the permissive inference of knowing, wrongful use. Any objection appellant may have had was forfeited, and there was no error -- much less plain error -- in admitting the evidence. The weight of any evidence introduced on the merits by the defense at trial was a matter for consideration by the factfinder -- here, the military judge -- on the question of factual sufficiency, and it did not affect the legal sufficiency of the conviction based upon the permissive inference of knowing, wrongful use.

III. CONCLUSION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

CONCUR:

SULLIVAN, Judge (concurring in part and in the result):

In Belfast, during the height of the "troubles" (the seemingly never-ending struggle between the Protestants and the Catholics in Northern Ireland), there was a popular saying:

> Anyone who isn't confused here really doesn't understand what is going on.

I have sensed similar confusion in our case law concerning urinalysis test results and, perhaps, so has the Judge Advocate General of the Navy who recently certified no less than seven drug cases to this court on this specific issue.[1]

The Confusion Over Campbell

This Court's more recent case law in the area of drug testing in the military has caused this confusion. I speak primarily of the twin Campbell opinions: *United States v. Campbell*, 50 M.J. 154 (1999) ("*Campbell I*"), *and United States v. Campbell*, 52 M.J. 386 (2000) ("*Campbell II*"). Hopefully, this confusion will end because, in the instant case, our Court now recognizes the problem. Although I still believe the *Campbell* decisions were wrongly decided, I join the majority's "fresh attention" to the "applicable principles governing litigation of urinalysis cases." M.J.

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[1] *United States v. Barnes, United States v. Magyari, United States v. Mahoney, United States v. Shelhart, and United States v. Powe*, 54 M.J. 226 (2000); *United States v. Sterne*, 54 M.J. 233 (2000); *United States v. Ryan*, 54 M.J. 680 (2000). The Court of Criminal Appeals reversed drug convictions in all these cases on the basis of legal insufficiency of urinalysis evidence, citing the *Campbell* decisions.

at (9). In particular, I agree with the majority's express limitation of the twin *Campbell* decisions to the question of *the admission of novel scientific evidence of urinalysis* proferred by the Government to show drug use. *See United States v. Bush*, 47 M.J. 305 (1997); *United States v. Youngberg*, 43 M.J. 379 (1995); *United States v. Nimmer*, 43 M.J. 252 (1995). I also agree with its holding in this case that there is no mandatory foundational requirement for the admission of urinalysis evidence (old or new) that the Government show a certain nanogram count rules out innocent ingestion and that the Government must establish that a normal person would have experienced the physical and psychological effects of the drug.

Appellant's case is but one example of the *Campbell* confusion. In the instant case, the appellate court below effectively ignored the majority decision in *Campbell I* on the basis that a motion for reconsideration was pending and affirmed this conviction using the cases cited in my dissent in *Campbell I*. *See Green*, unpub. op. at 2; 50 M.J. at 162; *see also United States v. Pugh*, No. 9600811 (Army Ct. Crim. App. Dec. 8, 1998) (unpub. op.). Another example is *United States v. Tanner*, 53 M.J. 778 (A.F. Ct. Crim. App. 2000), where the lower appellate court purported to follow *Campbell I* but still affirmed a drug conviction. There is also *United States v. Barnes*, 53 M.J. 624 (N.M. Ct. Crim. App. 2000), set aside, M.J. (Daily Journal June 11, 2001), and the cases cited in note 1, supra, where the lower appellate court reversed drug convictions using the majority opinions of the twin *Campbells*.

Although it is my earnest hope that today's decision will make clear the law pertaining to drug test results, it is important to understand the root of the *Campbell* confusion. In my view, the confusion started in the portion of *Campbell I* which required the Government to meet a three-

part standard of proof for "legal sufficiency," which included evidence

> that the [drug] cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug[.]"

50 M.J. at 160. To this deviation from our case law, I dissented. The majority, however, refused to even acknowledge this holding was a departure from our case law. 50 M.J. at 162.

Then came *Campbell II*. *Campbell II* was an opinion of our Court in response to the Government's motion to reconsider *Campbell I*. *Campbell II*, however, added a lack of clarity to the existing confusion by its apparent backing-off from the three-part standard of *Campbell I*.[2] It stated:

> The petition for reconsideration raises the issue of whether the three-part standard is mandatory in all drug testing cases. Given the rapid pace of technological change, *we note that the three-part standard does not necessarily constitute the only means of proving knowing use. If the test results, standing alone, do not provide a rational basis for inferring knowing use, then*

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[2] *Campbell II* also held that proof that "human beings as a class" experienced the physical and psychological effects of the drugs was legally sufficient (unlike *Campbell I*, which required proof concerning the effects experienced by the accused person who actually took the test). 52 M.J. at 389. I address the propriety of this proof requirement later in this opinion.

the prosecution must produce other direct or circumstantial evidence of knowing use in order to meet it burden of proof.

52 M.J. at 388 (emphasis added).

In my view, the problem of clarity in *Campbell II* seems rooted, in part, in the guidance noted above. To me, this *guidance* is unclear. When does a litigant (either the prosecution or the accused) know that in their case "the test results, standing alone, do not provide a *rational basis* for inferring knowing use?" Prosecutions and defenses of felony drug cases should be built on firmer and clearer guidance. Without such guidance, the law *could* be applied unequally (unfortunately, this may have already happened--as I shall suggest below).

As stated before, I am pleased that the majority opinion today takes the opportunity to substantially correct the confusion previously caused by the twin *Campbells*. It makes clear that the twin *Campbells* are only applying the three-part standard (or a legally equivalent alternative) to matters concerning *admissibility of novel scientific evidence*.[3] Moreover, it makes clear that proof ruling out innocent ingestion or establishing that a normal user would have felt the effects of the drug is not required, even for admission of novel scientific evidence. *See United States v. Bush, supra, United States v. Youngberg, supra, and United States v. Nimmer, supra*. As I mentioned above and as a final point to illustrate the impact of the *Campbell*-confusion issue, I wish to compare the present case of

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[3] It is interesting to note that the phrase "admissibility of novel scientific evidence" is not to be found in either of the twin *Campbell* opinions, but the phrase "legal sufficiency" is. 52 M.J. at 388; 50 M.J. at 160-61. (See note 1, supra).

Sergeant Green with the case of Lance Corporal Warren T. Collins. *United States v. Collins*, No. 99-1217 (N.M. Ct. Crim. App. July 28, 2000) (unpub. op.), *pet. denied*, 54 M.J. 430 (2001). Both are Marines. Both trials were at Marine bases in North Carolina at approximately the same time (Green was sentenced in December 1997 and Collins was sentenced in July 1998). Both were convicted of using cocaine based on urinalysis tests at the same testing site in Jacksonville, Florida. (Green lab result was 213 nanograms per milliliter of BZE (the metabolite for cocaine) and Collins lab result was 561 nanograms per milliliter). The lab test procedure was the same for both Green and Collins (radioimmunoassay analysis ("RIA") followed by a gas chromatography - mass spectrometry ("GCMS") test). Both Green and Collins went AWOL (absent without leave) weeks after their drug tests. Both had their convictions reviewed by the same Court of Criminal Appeals. There, the similarities end.

Green today has his drug conviction affirmed, and forever he will have the record of a federal felony drug conviction. Collins, on the other hand, had his drug conviction reversed by the Court of Criminal Appeals and does not have a federal drug record. Two completely different results from the same Court of Criminal Appeals. Why? The answer is *Campbell*. As the Court of Criminal Appeals said in *Collins*:

> The recent decision of our superior court in *Campbell* significantly modified the conditions under which the Government may rely upon this permissive inference [the inference of knowing use].
>
> Although *Campbell* dealt with lysergic acid diethylamide and the reliability of the

> testing methodology employed in that case, we do not believe that *Campbell* can be limited to its facts . . . . *Campbell*, however, provides that the "prosecution cannot rely solely on the presence in the body of the drug or its constituent elements." *Campbell*, 50 M.J. at 160 (1999). . . .
>
> * * *
>
> In the appellant's case, the Government adequately established that BZE does not naturally occur in the human body, and that the result of the urine test was reliable. *We find, however, that the testimony of LT Taylor [the lab expert] did not establish that the cutoff level and the appellant's nanogram level was sufficient to discount unknowing use and to indicate that the appellant experienced the physical and psychological effects of the drug*. Additionally, no other evidence presented was sufficient to permit the prosecution to rely upon the inference. *See Campbell*, 52 M.J. at 388-89. Since the prosecution is not entitled to rely upon the presumption of knowing use in this case, and since it did not present any other direct or circumstantial evidence of knowing use, we find that the evidence is legally insufficient to prove the first element of the offense. *See United States v. Barnes*, 53 M.J. 624 (N.M. Ct. Crim. App. 2000).

Unpub. op. at 3-4 (emphasis added).

Since *Collins* was a drug conviction reversal which was never appealed to our Court by the Government in the

certification process, Collins now stands acquitted of drug use. Yet Green has a federal felony drug conviction on his record. To me, it seems unfair that Green and Collins are treated differently under the law.

Harper, Ford, and the Twin Campbells

For almost fifteen years, our military justice system has operated on the presumption that *United States v. Harper*, 22 M.J. 157 (CMA 1986), and *United States v. Ford*, 23 M.J. 331 (CMA 1987), are good law. These cases recognize that urinalysis evidence may be admitted at court-martial but require its reliability to be shown to the factfinder in each case in order to legally sustain a criminal conviction. *See United States v. Murphy*, 23 M.J. 310 (CMA 1987); cf. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 632-33, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989) (Supreme Court approval of urinalysis evidence in administrative proceedings). In my view, these decisions are still good law, and under the doctrine of stare decisis, they deserve great weight today. *See United States v. Tualla*, 52 M.J. 228, 231 (2000).

I have been concerned that the twin *Campbell* decisions have raised questions concerning the meaning and correctness of those decisions, which have greatly upset the practice of military law. More importantly, *Campbell I* and *II* called into question the validity of hundreds of thousands of urinalysis tests and thousands of prosecutions based on the reported results of those tests. Today, the majority's "fresh attention" to the Campbell decisions, both restricting and modifying their holdings with respect to the admission of "novel scientific evidence," alleviates my concern. __ M.J. at (8). Nevertheless, I write to make clear my views in this area of the law.

First, *United States v. Harper, supra*, did not establish an inflexible evidentiary-sufficiency rule for all urinalysis cases. *See United States v. Boulden*, 29 M.J. 44, 47 (CMA 1989). It evaluated and approved the particular evidence presented in *Harper, i.e.*, evidence raising a permissive inference of wrongfulness recognized in military law and additional expert testimony that a particular nanogram count ruled out passive inhalation and indicated that the user at some time experienced physical and psychological effects of the drug. *United States v. Harper, supra* at 163. In *United States v. Ford*, 23 M.J. at 336-37, however, this Court further addressed the legal sufficiency of proof based on the permissive inference alone, *i.e., without additional expert testimony on the nanogram count and its bearing on passive inhalation or the experience of physical and psychological effects of the drug. See generally United States v. Van Horn*, 26 M.J. 434, 437 (CMA 1988) (expert testimony relating nanogram count to the degree of certainty that drug in urine); cf. *United States v. Harper, supra* (expert testimony relating nanogram count to the probability that user felt physical or psychological effects of drug).

Second, this Court approved the more limited type of proof in Ford and has done so repeatedly in subsequent cases. In *United States v. Campbell*, 50 M.J. at 162 (Sullivan, J., dissenting), I said:

In reality, therefore, the majority makes new law in this case and, in the process, raises serious questions about military drug prosecutions based on our past cases. *Harper* was the first word, *not the last word* or the only word, on the subject of sufficiency of evidence in urinalysis cases. *See United States v. Bond*, 46 M.J. 86 (1997); *United States v. Pabon*, 42 M.J. 404; *United States v Thompson*, 34 M.J. 287 (CMA 1992); *United States v. Boulden, supra*; *United States v. Ford*, 23 M.J. 331 (CMA 1987).

Moreover, the majority's new approach to drug prosecutions goes far beyond the rules for proving drug cases now provided by the President in the Manual for Courts-Martial, United States (1998 ed.). *See* para. 37(c), Part IV. I must dissent.

In short, contrary to *Campbell I* and *II*, this Court has never required the Government (for evidentiary sufficiency purposes or for evidentiary admissibility purposes) to introduce evidence that a certain nanogram count discounted innocent ingestion and indicated that the accused, or a user in general, would have experienced the physical or psychological effects of the drug. *See United States v. Pabon*, 42 M.J. 404, 406-07 (1995); cf. *United States v. Hunt*, 33 M.J. 345, 347 (CMA 1991) (legal insufficiency found because no testing data whatsoever or expert testimony explaining it admitted). Accordingly, I applaud the majority's ending of this confusion and its rejection of an evidentiary sufficiency approach to *Campbell I and Campbell II*. I also join its adoption of a more flexible approach to the admission of urinalysis evidence, even in cases involving novel scientific evidence. *See United States v. Bush, supra, United States v. Youngberg, supra, and United States v. Nimmer, supra; see generally* Paul Giannelli and Edward Imwinkelried, *Scientific Evidence: The Fallout from Supreme Court's Decision in Kumho Tires*, 14 Criminal Justice (ABA Winter 2000).

Put simply, the Government is not required to disprove innocent ingestion or show that a particular accused in a drug case felt the physical and psychological effects of the drug he was accused of taking, or that a user in general would have felt such effects. It is unclear whether the state of the art in drug testing would permit these requirements to be met in many cases.

The Decision in This Case

For me, this case is a simple one to decide using our existing case law (minus the twin *Campbells*). The record shows that the drug conviction at issue in this case was supported by proper expert testimony concerning the test results on a urine sample using RIA (R. 102-03) and GCMS analysis. (R. 104) Our Court has approved the admission and legal sufficiency of such evidence in *United States v. Harper*, *supra*, and more recently in *United States v. Bond*, 46 M.J. 86, 89 (1997). I agree with the majority today that this evidence was admissible and legally sufficient to prove beyond a reasonable doubt that appellant wrongly used cocaine. *See United States v. Ford*, 23 M.J. 331, *supra*. Therefore, I vote to affirm the conviction in this case.

GIERKE, Judge (dissenting):

En route to affirming the decision below in this case, the majority has offended the Due Process Clause of the Constitution, transformed Article 112a into an absolute-liability offense, and modified the test for admissibility of scientific evidence. I believe that the mere presence of a drug metabolite in the body, standing alone, is insufficient to overcome the presumption of innocence. *United States v. Bond*, 46 M.J. 86, 92 (1997) (Gierke, J., dissenting); *see United States v. Harper*, 22 M.J. 157, 163-64 (CMA 1986).

"An inference is 'irrational' or 'arbitrary' and thus violates due process 'unless it can at least be said with substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend. '" *Bond, supra*, quoting *Barnes v. United States*, 412 U.S. 837, 842, 37 L. Ed. 2d 380, 93 S. Ct. 2357 (1973). Furthermore, "if the permissive inference is the only proof of guilt, then it must meet a higher standard than

'more likely than not'; it must flow from the proved fact beyond a reasonable doubt." *Id.*, citing *Turner v. United States*, 396 U.S. 398, 24 L. Ed. 2d 610, 90 S. Ct. 642 (1970), and E. Imwinkelried, P. Giannelli, F. Gilligan, and F. Lederer, *Courtroom Criminal Evidence* § 2920 at 975 (2d ed. 1993); *see State v. Flinchpaugh*, 232 Kan. 831, 659 P.2d 208, 212 (Kan. 1983) (discovery of drug in person's blood insufficient to prove knowing possession).

The majority opinion permits the trier of fact to infer drug use from the presence of the metabolite in the body, and then to use the same evidence to infer knowing use, without any other evidence from which knowing use may be inferred. Proof of the first element of the offense, *i.e.*, use, automatically proves the second element, *i.e.*, wrongfulness.

The majority asserts that it is not creating an absolute liability offense. M.J. at (11 n.4). It recognizes that Congress did not intend Article 112a to create an absolute-liability offense. However, when a court-martial may convict an accused based solely on the presence of a metabolite in the body, we have created an absolute-liability offense, no matter how we rationalize it or what we call it.

In *Harper, supra*, this Court held that a reliable urinalysis supplemented by expert testimony that the metabolite was not naturally produced by the body was sufficient to permit an inference of use. This Court declined, however, to hold that the results of a urinalysis test, standing alone, were sufficient to prove wrongful use.

In *United States v. Ford*, 23 M.J. 331, 336-37 (CMA 1987), this Court specifically addressed, for the first time, the "constitutional sufficiency" of the permissive inference of wrongfulness. This Court concluded that it "comports with due process," because of the limited access to drugs in

the armed forces, which greatly reduces the probability of innocent ingestion; the fact that servicemembers are on notice to avoid any and all contact with drugs, "which further reduces the possibility of innocent ingestion;" the fact that "the physiological effects from the internal presence of the drug in the body might serve to alert the user to the presence of a controlled substance in his system;" and the fact that a person "generally knows what he consumes." Based on these premises for the permissive inference, this Court concluded that there was "no constitutional violation" in a conviction based on the inference of wrongfulness, even if the accused presents evidence to the contrary. *Ford* cites *Harper* with approval in several places (23 M.J. at 332, 333, 336, and 337), strongly indicating that this Court intended *Ford* to be consistent with *Harper*, and not to overrule it or erode it in any way.

In *Bond, supra*, this Court deviated from the *Harper-Ford* approach and upheld a conviction based solely on the permissive inference of knowledge, even though the factual predicate for the inference that had been set out in *Ford* was missing. Accordingly, I dissented.

In *Campbell I*, 50 M.J. 154 (1999), and *Campbell II*, 52 M.J. 386 (2000), this Court returned to the *Harper-Ford* analysis. The majority now attempts to recast *Campbell I* and *Campbell II* as decisions based on admissibility of novel scientific evidence, instead of decisions based on sufficiency of the evidence. Unfortunately, the language of the decisions belies the majority's attempt. While the granted issue in *Campbell I* was the admissibility of evidence obtained through a novel testing procedure, this Court declined to address the granted issue. Instead, it decided the case on the basis of two issues specified by the Court, both involving sufficiency of the evidence. 50 M.J.

at 161-62. Similarly, *Campbell II* was not decided on the basis of admissibility of the evidence, but on the legal insufficiency of the evidence. In *Campbell II*, we said:

> In the present case, the deficiency was the absence of evidence establishing the frequency of error and margin of error in the testing process. Lacking such evidence, we held that the prosecution did not reliably establish that appellant's urine sample tested at or above the Department of Defense cut-off level and *did not reasonably exclude the possibility of unknowing ingestion*. Since the prosecution did not present any other direct or circumstantial evidence of knowing use, *we held the evidence was legally insufficient to prove this element of the offense*.

52 M.J. at 388 (emphasis added).

Furthermore, even if we decided this case solely on the basis of the admissibility of the urinalysis test results, I would be unable to join the majority. The majority expands the holding *in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), to require the military judge to assess, as a condition precedent to admissibility, whether the urinalysis test results support the inference of "knowing use." __ M.J. at (11 n.4). By requiring the military judge to determine, as a condition precedent to admissibility, that the expert testimony tend to prove "knowing use," the majority requires that the expert testimony tend to prove both elements of the offense: (1) use; and (2) wrongfulness, of which knowledge is a component. *See paras.* 37b(2)(a) and (b) and para. *37b(5)*, Part IV, Manual, *supra*.

In my view, *Daubert* established standards for determining the reliability of scientific evidence. It did not establish standards for overcoming the presumption of innocence, nor did it establish a requirement that scientific evidence tend to prove all elements of an offense as a condition of admissibility. To be admissible, a reliable drug test need only "assist the trier of fact to understand the evidence or to determine a fact in issue." Mil. R. Evid. 702, Manual for Courts-Martial, United States (2000 ed.); *Daubert*, 509 U.S. at 591. It need not, as the majority requires, tend to prove *both* elements of the offense. The majority's decision goes far beyond what *Daubert* requires.

This Court decided long ago in *Harper* that a reliable urinalysis test is relevant to prove use, because use may be inferred from the presence of a drug metabolite in the body. The majority now requires that, in order to be relevant, the urinalysis test must not only support an inference of use, it must also support an inference of knowing use.

In my view, a reliable urinalysis test is relevant under *Daubert* to prove use of drugs. However, it does not prove knowing use unless it is supplemented by expert testimony or other evidence showing knowing use, or at least permitting knowledge to be rationally inferred. *See United States v. Murphy*, 23 M.J. 310, 312 (CMA 1987). In *Campbell II*, this Court held, "If the test results, standing alone, do not provide a rational basis for inferring knowing use, then the prosecution must produce other direct or circumstantial evidence of knowing use in order to meet its burden of proof." 52 M.J. at 388.

In the case before us, I consider it significant that the Government has failed to present any evidence to support its argument that this is an impossible evidentiary burden. It may be met by circumstantial evidence of knowing use that

is extrinsic to the urinalysis test, as in *United States v. Barnes*, 53 M.J. 624 (N.M.Ct.Crim.App. 2000), *set aside*, M.J. (Daily Journal June 11, 2001), or by expert testimony that the metabolite level was high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user would have experienced the physical and psychological effects of the drug. As we emphasized in *Campbell II*, it is not necessary that the expert testify that a particular accused would have experienced the effects of the drug. "It is sufficient if the expert testimony reasonably supports the inference with respect to human beings as a class." 52 M.J. at 389.

I have consistently taken the position that the Due Process Clause does not permit courts-martial to convict an accused of a felony drug offense based solely on the presence of a drug metabolite in his or her body. The majority's decision in this case is inconsistent with that position. Accordingly, I dissent. *See United States v. Bond, supra.*

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

R.B. LEO. D.A. ANDERSON
K.J. NAUGLE

UNITED STATES

v.

Nolan P. Green,
Sergeant (E-5), U.S. Marine Corps

NMCM 99 00162 Decided 10 Februsty 2000

Sentence adjudged 1 December 1997. Military Judge: T.J. Hamilton II. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding General, Marine Wing Support Squadron 274, MWSG 27, 2d MAW, FLFLant, MCAS, Cherry Point, NC.

LT M. ERIC EVERSOLE, JAGC, USNR, Appellate Defense Counsel
LT WILLIAM C. MINICK, JAGC, USNR, Appellate Government Counsel

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, contrary to his pleas, of one

specification of unauthorized absence and two specifications of wrongfully using cocaine in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a (1994). The appellant was sentenced to confinement for 68 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial, the three assignments of error, the Government's response, and oral argument. Finding error materially prejudicial to the substantial rights of the appellant, we take corrective action in our decretal paragraph. *See* Arts. 59(a) and 66(c), UCMJ.

Legal and Factual Sufficiency

In his first and second assignments of error, the appellant contends that the evidence is legally and factually insufficient to find him guilty of the wrongful use of cocaine.

The test for legal sufficiency is whether a reasonable factfinder, viewing the evidence in the light most favorable to the prosecution, could find all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The term reasonable doubt does not mean that the evidence must be free

from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

After being on leave for over 30 days, the appellant provided a command-directed urine sample. Ten days later, after his first sample tested positive for the cocaine metabolite, benzoylecgonine (BZE), the appellant provided a consent urine sample. This second sample also tested positive for the cocaine metabolite, BZE. The Government presented the laboratory results for each sample and evidence of an unbroken chain of custody. In addition, the Government presented expert testimony to explain the testing procedures and the meaning of the results. This testimony included an explanation how the metabolite BZE comes to be present in the body. Such evidence alone is sufficient to permit an inference of wrongfulness and a finding beyond a reasonable doubt that an individual wrongfully used a controlled substance. *See United States v. Bond*, 46 M.J. 86 (1997); *United States v. Pabon*, 42 M.J. 404 (1995); *United States v. Thompson*, 34 M.J. 287 (C.M.A. 1992); *United States v. Boulden*, 29 M.J. 44 (C.M.A. 1989); *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987); *United States v. Harper*, 22 M.J. 157, 160-163 (C.M.A. 1986). *See also United States v. Graham*, 50 M.J. 56, 58-59 (1999). *But see United States v. Campbell*, 50 M.J. 154 (1999), *petition for reconsideration filed* (C.A.A.F. Jun. 16, 1999) (holding that evidence of reliability of novel GC/MS/MS test result for LSD insufficient to permit drawing of inference of wrongfulness). This is true even if the individual offers contradictory evidence designed to defeat the inference and that evidence is not rebutted by the Government, provided the factfinder is persuaded

beyond a reasonable doubt that the inference should be drawn. *Bond*, 46 M.J. at 89-90 (citing *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987)).

For his part, the appellant relied on a good military character defense to defeat the inference. He did not present any affirmative claim of innocent or unknowing ingestion. The factfinder was not persuaded, and neither are we. After reviewing all of the evidence presented, we are convinced beyond a reasonable doubt with respect to the first urinalysis that the evidence was legally and factually sufficient to draw the inference of wrongfulness and that the appellant wrongfully used cocaine.

With respect to the second urinalysis, however, we are not convinced beyond a reasonable doubt that the evidence was factually sufficient to support a finding of guilty. Reviewing the second packet of laboratory results, we note that the lab ran four separate gas chromatograph-mass spectrometry tests of the second urine sample. In the first and second tests, no cocaine metabolite was detected. Prosecution Exhibit 20 at 11-12. In the third test, the sample tested positive for the cocaine metabolite with a concentration of 599 ng/ml. Prosecution Exhibit 20 at 21. The fourth test indicated a positive result of 399 ng/ml. Prosecution Exhibit 20 at 22. In view of these seemingly inconsistent results that went unexplained at trial, we must set aside the finding of guilty to the second specification of cocaine use. *See United States v. Mack*, 33 M.J. 251 (C.M.A. 1991).

Sentence Appropriateness

In his final assignment of error, the appellant contends that his sentence is inappropriately severe. Because we have set aside one of the guilty findings, we must reassess the sentence, and the assignment of error has become moot.

Conclusion

We set aside the finding of guilty to Specification 2 of Charge II. Specification 2 of Charge II is dismissed. We affirm the remaining findings. We have reassessed the sentence under the principles contained in *United States v. Cook*, 48 M.J. 434, 437-38 (1998), *United States v. Peoples*, 29 M.J. 426, 427-29 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). We affirm only so much of the sentence as provides for reduction to pay grade E-1 and a bad-conduct discharge.

APPENDIX C

U.S. COURT OF APPEALS FOR THE ARMED FORCES

2001 CAAF LEXIS 681

No. 01-5005

Crim.App. No. 94 01927

Robert L. BARNES
U.S. Marine Corps, *Appellant*

v.

United States, *Appellee*

Decided June 11, 2001

Opinion:

On consideration of the certified issue,* in light of United States v. Green, No. 00-0268, __ MJ __ (2001), we answer the certified issue in the affirmative. Accordingly, it is ordered and adjudged that the decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further consideration in light of Green.

*WHETHER THE LOWER COURT ERRED IN FINDING THE EVIDENCE LEGALLY INSUFFICIENT TO PERMIT THE FACTFINDER TO INFER THE ACCUSED'S KNOWING AND WRONGFUL USE OF MARIJUANA WHERE UNITED STATES V. CAMPBELL STATED IT DID NOT CREATE NEW LAW AND WHERE THE EVIDENCE PRESENTED AT TRIAL WAS AT LEAST THE SAME QUANTUM OF EVIDENCE THIS COURT PREVIOUSLY FOUND LEGALLY SUFFICIENT IN NUMEROUS PRE-CAMPBELL CASES.

DISSENT: GIERKE, Judge (concurring in part and dissenting in part):

I disagree with the majority's decision to decide this case on the basis of the majority opinion in Green. See *United States v. Green*, No. 00-0268, __ MJ __, ___ (2001) (Gierke, J., dissenting). However, I believe that the facts in this case are sufficiently different from Green to warrant a different result.

It appears to me that the court below may have gone astray in this case when it evaluated the evidence outside the context of appellant's positive urinalysis and concluded that the testimony of a neighbor whom appellant asked for drugs, standing alone, was insufficient as a matter of law to permit an inference of knowing use. *See United States v. Perry, 37 MJ 363 (CMA 1993).* Perry held that an "appellant's knowledge of the identity of possible drug users neither proves nor disproves that, during the time

period alleged, he knowingly used cocaine." *Id. at 364.* I agree with the Perry holding, but I see a significant difference between the probative value of knowing the identity of possible drug users, as in Perry, and the probative value of asking a neighbor for drugs, as in the present case.

I believe that the court below may have applied an incorrect legal standard to its legal sufficiency determination. In my view, the court below erred in concluding that there could be no permissive inference of knowing drug use without scientific evidence that appellant "experienced the physical and psychological effects of the drug." *United States v. Campbell, 52 M.J. 386, 899-389 (2000).*

The absence of this scientific evidence is important when the prosecution relies solely on the positive urinalysis. However, in this case, the prosecution did not rely solely on the positive urinalysis, but also produced extrinsic evidence of knowing drug use.

I believe that appellant's conversation with his neighbor must be viewed together with the positive urinalysis test, not independently of it. The question presented to the court below was whether any rational factfinder could have inferred that, based on the positive urinalysis test and the testimony of appellant's neighbor, appellant knowingly used marijuana on the date charged. See *Jackson v. Virginia, 443 U.S. 307, 319 (1979); see also United States v. Walker, 42 MJ 67, 71 (1995)* (recognizing that prior drug use may be admissible under Mil. R. Evid. 404(b), Manual for Courts-Martial, United States (2000 ed.), to prove knowledge).

Under the circumstances, it is unclear to me whether the court below applied the correct legal standard in its evaluation of the legal sufficiency of the evidence. Accordingly, I join the majority's decision to remand the case for reconsideration of the legal sufficiency of the evidence supporting the inference of knowledge.

APPENDIX D

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

W.A. DeCICCO R.H. TROIDL
D.A. ANDERSON

UNITED STATES

v.

Robert L. BARNES,
Staff Sergeant (E-6), U.S. Marine Corps

PUBLISH

NMCM 94 01927 Decided 31 May 2000

Sentence adjudged 12 May 1994. Military Judge: N.A. Puckett. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Corps Communication-Electronics School, Marine Corps Air Ground Combat Center, Twentynine Palms, CA.

LT M. ERIC EVERSOLE, JAGC, USNR, Appellate Defense Counsel
LT MARGARET E. JOLLY, JAGC, USNR, Appellate Government Counsel

DeCICCO, Chief Judge:

This case is before us for the third time. A special court-martial composed of a military judge convicted Staff

Sergeant Barnes, contrary to his pleas, of a single specification of using marijuana in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge.

In our first review of the case, we found plain error in the staff judge advocate's post-trial recommendation to the convening authority. The basis of the error was the omission of information concerning the appellant's receipt of the Navy Commendation Medal for his service in a ground combat element in Somalia in 1992 and 1993. We returned the record for a new recommendation and action. *United States v. Barnes,* 44 M.J. 680 (N.M.Ct.Crim.App. 1996). A new recommendation was completed which listed the appellant's Navy Commendation Medal. The convening authority again approved the sentence as adjudged.

In our second review, we found merit in the appellant's argument that he had been denied effective assistance of counsel in the post-trial proceedings before the convening authority's new action. Prior to that action, the appellant's defense counsel decided not to submit any clemency matters to the convening authority without ever attempting to contact the appellant. We again set aside the action of the convening authority and directed another recommendation and action. *United States v. Barnes,* No. 9401927 (N.M.Ct.Crim.App. 15 Aug 1997)(unpublished decision). On 16 October 1998, the convening authority approved the sentence again.

In this appeal, the appellant raises four errors for our consideration. Our resolution of the first issue renders it unnecessary to discuss the other three. Applying the

decision of our superior court in *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000), we find that the evidence was legally insufficient in this case.

Facts

Following the appellant's not guilty pleas, the prosecution's case-in-chief was based solely on the result of a urinalysis test. The prosecution called three witnesses: the urinalysis observer, the urinalysis coordinator, and a forensic chemist. The first two witnesses testified as to the collection procedures and the forwarding of the appellant's urine sample to the Navy Drug Screening Laboratory (NDSL) in San Diego. The appellant did not contest any part of the collecting, forwarding or testing of his urine sample at trial, and does not challenge those matters now. We find no deficiencies in these portions of the prosecution's case.

The other witness called by the prosecution during its case-in-chief was Lieutenant Commander Gerald Grimsley, Medical Service Corps, U.S. Navy, the Deputy Technical Director of NDSL San Diego, and one of three forensic chemists who review positive urinalysis results at the NDSL. LCDR Grimsley testified as to the layout of the laboratory, the security measures taken at the lab, and the routine procedures concerning handling and testing of urine samples. He stated that NDSL San Diego utilized three tests: two screening tests using a radio-immuno assay procedure and a confirmation test, the gas chromatography/mass spectrometry test. He stated that a sample would be reported as positive if the result was at or above the Department of Defense cutoff level in each of the

three tests. In the case of marijuana, a sample would be reported as positive if it contained at least 15 nanograms per milliliter (ng/ml) of the marijuana metabolite (THC).[1] The test on the appellant's sample resulted in a reading of 19 ng/ml. LCDR Grimsley testified that the human body does not naturally produce THC, that it must be ingested, and that it cannot come from anything but cannabis plant material. He said the testing conducted in the laboratory was extremely accurate and reliable.

On cross-examination, the defense attempted to show that a urine sample could test positive if one ate marijuana without heating it. LCDR Grimsley disagreed and adhered to his opinion that marijuana must be heated before there would be any psychoactive effects. He stated that he could not render an opinion either as to the method of ingestion or whether the individual whose urine was tested "felt the physiological effects." Record at 27.

On redirect examination, LCDR Grimsley described the effects that marijuana and its metabolite have on the human body. He said that, depending on the amount of THC, an individual could experience a feeling of euphoria, an altered perception of time, an increase in blood pressure, a flushed feeling, giddiness, talkativeness, and increased hunger. Record at 28. He emphasized that the experience of the effects would depend on the amount ingested, and that the more one ingests, the stronger the effects. He did not specifically relate these effects to a person with a level of 19 ng/ml.

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[1] The actual chemical name for the metabolite of marijuana is delta-9-THC-9-carboxylic acid.

The appellant testified in his own defense. He stated that he had never knowingly ingested marijuana or any other illegal substances in his life. He had been tested many times before, and he had never had a positive test result. He had no explanation for the positive result and had "racked his brain" to no avail. On cross-examination, he denied asking his neighbor for marijuana, but admitted he had observed his neighbor use marijuana. On redirect examination, he added that he would leave when he saw his neighbor use marijuana.

Also during the defense case, the appellant called a lieutenant colonel, a captain, and a staff sergeant as character witnesses. All three testified to the appellant's good military character and truthfulness. On cross-examination, trial counsel was permitted to ask the lieutenant colonel and the captain, over defense objection, if they were aware that the appellant socialized on a regular basis and spent time in the presence of a person who used marijuana in front of the appellant. Both said they were not aware, and that such an association would affect their opinions of the appellant's character.

In its case on rebuttal, the prosecution called the appellant's neighbor, Mr. Derek Bennett. Mr. Bennett testified that he smoked marijuana four or five times in the appellant's presence, that the appellant did not leave immediately, and that the appellant asked him for marijuana on two occasions, once before the urinalysis and once after. Mr. Bennett said he never gave the appellant marijuana because he knew the appellant was a Marine and was not allowed to use it. He added that he thought the appellant was joking when he asked for it. Under cross-examination, Mr. Bennett stated that he was born with a collapsed lung,

and this event affected half of his brain. He was on disability, could not read or write, and he admitted that his memory was not very good. There was no evidence that anyone had ever seen the appellant actually possess or use marijuana. On surrebuttal, the appellant again denied having asked Mr. Bennett for marijuana.

Discussion

In its original opinion in *Campbell*, the Court of Appeals for the Armed Forces held that the prosecution had failed to prove the frequency of error that would indicate that a gas chromatography tandem mass spectrometry test reliably detected the presence of the metabolites of lysergic acid diethylamide. It also found a failure of proof that the test reliably quantified the concentration of the metabolites and that the Department of Defense (DoD) cutoff level of 200 picograms per milliliter was greater than the margin of error and was high enough to reasonably exclude the possibility of a false positive and establish the wrongfulness of any use. *Campbell*, 50 M.J. at 161. The Court added:

> To the extent that the prosecution seeks to rely on the permissible inference of knowledge from the presence of the drug in the sample, however, the cutoff level must be such as to rationally permit factfinders to find beyond a reasonable doubt that an accused's use was knowing.

Id. at 162.

The Court listed three factors that the prosecution's evidence must show to permit the invocation of the inference of wrongful use:

> Under applicable case law, the prosecution cannot rely solely on the presence in the body of the drug or its constituent elements. The cases which have permitted the inference of wrongfulness strictly require that the prosecution also establish the reliability of the testing methodology and explain the significance of the results of the test of the accused's sample. The prosecution's expert testimony must show: (1) that the "metabolite" is "not naturally produced by the body" or any substance other than the drug in question [citation omitted]; (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug" [citations omitted]; and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.

Id. at 160. The Court stated that this was well-established case law and did not establish new law. *Id.* at 161, n.2.

In its opinion on reconsideration, the Court stated that the prosecution "may" demonstrate the relationship between

the test result and the permissive inference of knowing, wrongful use through expert testimony establishing the three factors cited above. However, the three-part standard does not necessarily constitute the only means of proving knowing use and "[i]f the test results, standing alone, do not provide a rational basis for inferring knowing use, then the prosecution must produce other direct or circumstantial evidence of knowing use in order to meet its burden of proof." *Campbell*, 52 M.J. at 388.

In the case at bar, the prosecution presented testimony on the first and third *Campbell* factors, but it presented no evidence as to the second. LCDR Grimsley did not testify that the cutoff level of 15 ng/ml and the reported concentration of 19 ng/ml were high enough to reasonably discount the possibility of unknowing ingestion. Moreover, he specifically declined to opine as to whether this appellant or anyone else with a test result of 19 ng/ml of THC would have experienced the physiological effects of THC.

The offense of wrongful use of marijuana has two elements: that the appellant used marijuana, and that the use by the appellant was wrongful. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984 ed.), Part IV, ¶ 37b(2).[2] The first element contains a requirement that an accused have knowledge of the presence of the substance. *United States v. Mance*, 26 M.J. 244, 253 (C.M.A. 1988). The fact that the appellant's urine contained THC, therefore, provided only part of the evidence on the first element. The prosecution still had to prove knowledge of the presence of the drug. The inference provided by case law, if available, would provide this proof. However, in view of

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[2] This was the edition of the Manual for Courts-Martial in effect during the appellant's court-martial in 1994.

the lack of evidence in this case on the second factor from *Campbell*, the prosecution was not entitled to the benefit of this inference of knowing, wrongful use. *Campbell*, 52 M.J. at 388.

Without this inference, our superior Court's opinion on reconsideration allows us to examine the record for other "direct or circumstantial evidence of knowing use." *Id.* We have considered all of the other evidence in the record, particularly the appellant's presence where marijuana was being used and the testimony that he twice requested marijuana from Mr. Bennett. We have concluded that such evidence did not provide legally sufficient proof to rationally permit the factfinder to find that the accused's use was knowing during the time period alleged. The fact that he associated with a drug user and that he may have asked for marijuana from him neither proves nor disproves that the appellant's use of marijuana in this instance was knowing and wrongful. *See United States v. Perry*, 37 M.J. 363 (C.M.A. 1993).

Conclusion and Disposition

We therefore conclude that the prosecution's evidence was legally insufficient. This requires us to set aside the appellant's conviction.

Accordingly, the findings and sentence are set aside, and the Charge is dismissed.

Senior Judge TROIDL concurs.

ANDERSON, Judge (*dubitante*):

In light of *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000), I acquiesce *dubitante* in the result. *See United States v. Kelly*, 45 M.J. 259, 260 (1996)(holding that service courts of criminal appeals are not free to depart from precedent set by Court of Appeals for the Armed Forces); *but see United States v. Tualla*, 52 M.J. 228 (2000)("*Stare decisis* is a principle of decision making, not a rule, and need not be applied when the precedent at issue is 'unworkable or ... badly reasoned.'").

In *Campbell*, our superior Court held that for the Government to establish the permissive inference of knowing, wrongful use of drugs in a urinalysis case, an expert must testify that both "the [DoD] cutoff level and the reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have 'experienced the physical and psychological effects of the drug.'"[1] *Campbell*, 50 M.J. at 160 (citing *United States v. Harper*, 22 M.J. 157, 163 (C.M.A. 1986)) and *Campbell*, 52 M.J. at 388 (emphasis added). This cutoff/effect requirement will create several problems with

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[1] Although our superior Court commented in *Campbell* that this requirement is not new law, it nonetheless appears to be a major shift in the treatment of urinalysis cases. *See United States v. Bond*, 46 M.J. 86 (1997); *United States v. Pabon*, 42 M.J. 404 (1995); *United States v. Thompson*, 34 M.J. 287 (C.M.A. 1992); *United States v. Boulden*, 29 M.J. 44 (C.M.A. 1989); *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987); *United States v. Harper*, 22 M.J. 157, 160-163 (C.M.A. 1986); Major Walter M. Hudson & Major Patricia A. Ham, *United States v. Campbell: A Major Change for Urinalysis Prosecutions?*, ARMY LAW., May 2000 at 20-22. *See also United States v. Graham*, 50 M.J. 56, 58-59 (1999).

the current criminal prosecution of drug use offenses within the military.

First, the DoD cutoff requirement under the *Campbell* test makes it virtually impossible for the Government to establish a permissive inference of knowing, wrongful use of drugs based on the results of a urinalysis test. The DoD cutoff levels were designed to accurately identify the presence of a drug in a person's body, not to determine whether the user felt the effects of the drug. *See* Affidavit of Aaron J. Jacobs of 15 Jun 99 at 4-5. As explained by one expert, "the cutoffs were selected at least three times above levels that could be detected," essentially "to negate the possibility of false positives." *Id.* at 5. Because the cutoff levels were not established to reasonably discount the possibility of unknowing ingestion or to determine whether the user felt the effects of the drug, the cutoff level requirement of *Campbell* cannot be satisfied.

Second, the concentration of the drug or metabolite in a urine sample will have to be "very high" in order for an expert to testify that the possibility of unknowing ingestion can be reasonably discounted and that a reasonable likelihood exists that the user would have felt the effects of the drug. *Id.* at 6-7. The net result of this requirement is twofold: (1) many identified drug abusers will go unpunished; and (2) service members will learn to use drugs earlier in the holiday/weekend liberty period to lessen their urine concentration and avoid prosecution.

> "If, as *Campbell* seems to indicate, it is now required that, to draw the permissive inference of wrongfulness, an expert must testify that the possibility of innocent

> ingestion can be reasonably discounted or that it is reasonably likely that the user felt the physical or psychological effects of the drug, it is virtually certain that in many cases the prosecution's proof will fail." Hudson & Ham, *Campbell*, ARMY LAW., May 2000 at 22. "*Campbell* thus may be a way to make urinalysis prosecutions much more difficult, and more like civilian testing programs, and thereby cause the government to use administrative methods, rather than criminal prosecutions." *Id.* at 20.

drug use with the results of a urinalysis test after *Campbell*,[2] it has two clear options. One, it may seek a

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[2] The consequences of *Campbell* have been summarized as follows:

> *Campbell* could result in [a] significant shift in the trying of so-called "paper" urinalysis cases, at least when the reported level of drug in the urine is at or near the cutoff level. Administrative actions ... rather than trial by court-martial could potentially become the alternative means of disposition for this class of drug offenses. Furthermore, it seems logical that Article 15, UCMJ, punishments would also decrease. A soldier could turn down the Article 15 and demand trial by court-martial, knowing the prosecution's potential problems of proof. This, in turn, could potentially decrease the number of urinalysis tests conducted, because the test's significance as a drug deterrent will diminish. Indeed, one can postulate a "worst case scenario" for the government: if the consequences of a positive urinalysis result are purely administrative, this might create an incentive for soldiers who want to be discharged to take drugs and be subsequently administratively separated.

Hudson & Ham, *Campbell*, ARMY LAW., May 2000 at 25.

statutory fix in Article 112a, UCMJ, 10 U.S.C. § 912a, whereby the DoD cutoff levels are established as a per se standard for illegal drug use, much like a blood/alcohol, blood/breath concentration of 0.10 or greater is set as a per se standard for illegal intoxication in the drunk driving offense, Article 111, UCMJ. Two, it may reset the DoD cutoff levels at such a high level that an expert can provide the testimony necessary to satisfy the cutoff/effect requirement of *Campbell*. Because the first fix will provide for better utilization of current technology and more uniformity in result, it is preferable to the second.

For the Court

CHRISTINE E. SHEEHY
Clerk of Court (Acting)

APPENDIX E

U.S. COURT OF APPEALS FOR THE ARMED FORCES

2001 CAAF LEXIS 807

No. 01-5006

Crim.App. No. 98 01499

Henry A. MAGYARI
U.S. Navy, *Appellee*

v.

United States, *Appellant*

Decided July 2, 2001

Opinion:

On consideration of the certified issue,* in light of United States v. Green, No. 00-0268, __ MJ __ (2001), we answer the certified issue in the affirmative. Accordingly, it is ordered that the decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further consideration in light of Green.

*WHETHER THE LOWER COURT ERRED IN FINDING THE EVIDENCE LEGALLY INSUFFICIENT TO PERMIT THE FACTFINDER TO INFER THE ACCUSED'S KNOWING AND WRONGFUL USE OF METHAMPHETAMINE WHERE UNITED STATES V. CAMPBELL STATED IT DID NOT CREATE NEW LAW AND WHERE THE EVIDENCE PRESENTED AT TRIAL WAS AT LEAST THE SAME QUANTUM OF EVIDENCE THIS COURT PREVIOUSLY FOUND LEGALLY SUFFICIENT IN NUMEROUS PRE-CAMPBELL CASES.

DISSENT:

GIERKE, Judge (dissenting): I dissent from the order of the Court.

APPENDIX F

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

CHARLES Wm. DORMAN R.H. TROIDL
K. J. KNAUGLE

UNITED STATES

v.

Henry A. MAGYARI,
Draftsman First Class (E-6), U.S. Navy

NMCM 98 01499 Decided 31 May 2000

Sentence adjudged 7 April 1998. Military Judge: P.J. Straub. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Staff Enlisted Personnel, Commander Submarine Force, U.S. Pacific Fleet, Pearl Harbor, HI.

LT OMAR R. LOPEZ, JAGC, USNR, Appellate Defense Counsel
Maj MICHAEL D. TENCATE, USMC, Appellate Government Counsel

DORMAN, Senior Judge:

At his special court-martial the appellant was convicted, contrary to his pleas, of the wrongful use of methamphetamine. The appellant's offense violated Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The officers and enlisted members of his court sentenced the appellant to reduction to pay grade E-3 and a bad-conduct discharge. The convening authority approved the sentence.

We have carefully reviewed the record of trial, the appellant's six assignments of error, and the Government's response. Additionally, we considered the appellant's "Reply To Answer Of Government," his "Supplemental Arguments," and the Government's "Answer to Supplemental Argument(s)." We also considered the excellent oral arguments of appellate counsel presented on 25 May 2000. Following our review pursuant to Articles 59(a) and 66(c), UCMJ, we find error.

Legal Sufficiency

In his first assignment of error, the appellant challenges the legal sufficiency of his conviction. In support of his position, the appellant relies upon *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000). Based upon our understanding of the *Campbell* decision, we are compelled to agree with the appellant that the evidence is legally insufficient in this case.

Facts. The appellant was attached to Commander, Submarine Force, U.S. Pacific Fleet, located in Pearl Harbor, Hawaii. On 12 February 1998 he responded to a call for a random command urinalysis screening and provided a urine sample. At trial the appellant

acknowledged that his urine sample was properly labeled. The Government established that the appellant's urine tested positive for the presence of methamphetamine. This was established through the testimony of the program coordinator on the day the appellant's urine sample was collected, the individual who observed the appellant provide the sample, and Dr. Robert Czarny, a chemist from the Navy Drug Screening Laboratory [NDSL] where the urine was tested. In fact, the appellant's urine tested positive on four separate tests conducted by the NDSL. The first two tests were screening tests using a radio-immunoassay procedure. After both of those tests resulted in positive readings, two confirmatory tests were performed using the gas chromatography/mass spectrometry [GC/MS] test. The first confirmatory test revealed a reading of 2235 nanograms of methamphetamine per milliliter. This was well above the cut-off level of 500 nanograms. The second GC/MS test was conducted to determine the "handedness" of the methamphetamine molecules found in the appellant's urine, to rule out the possibility that the methamphetamine had come from some substance other than a controlled substance. Again this test revealed the presence of methamphetamine in the appellant's urine. The chemist further testified that methamphetamine does not naturally occur in the human body.

During cross-examination the chemist acknowledged that a reading of 2200 nanograms would be consistent with inadvertent use if the methamphetamine had been consumed within 12 hours of providing the urine sample. He also acknowledged that methamphetamine is odorless and tasteless, and that it is water-soluble. If the methamphetamine had been consumed within 12 hours of providing the urine sample, the dosage would have been

subtherapeutic, and it would not have produced an effect. On redirect, the chemist testified that the nanogram level is also consistent with a higher dosage taken more than 12 hours prior to providing the urine sample. In his opinion, if the methamphetamine had been consumed 60 hours before the sample was provided, the drug would have produced an effect on the person taking the drug.

The appellant testified that he did not knowingly use methamphetamine. Through his testimony, he suggested the possibility that he could have inadvertently consumed the drug the evening before he provided his urine sample. He testified that the prior evening he had gone to the Hard Rock Café and to a bar called The Wave, both located in Waikiki, HI. He testified concerning a minor run-in he had with two individuals who had taken his seat, and that of the woman he was with, when they both left their seats to use the restroom. His female companion also testified, confirming the evening's events as recalled by the appellant. She specifically testified that she did not see the appellant use any drugs on the evening of 11 February 1998.

The appellant also called an agent for the Naval Criminal Investigative Service to testify. He testified that drugs were readily available at The Wave, and that methamphetamine is the principal drug in Hawaii. He also testified that it is highly addictive and that it produces an "intense" high that can last up to 12 hours. He also testified that while it is possible to take methamphetamine orally, it is typically smoked or snorted. Oral consumption, however, is an inefficient way to obtain the effects of the drug. Of the 175 individuals he had come in contact with who had used methamphetamine, he had never heard of it being consumed

by putting it in food or drink, nor had he ever come across an incident where someone had put it in someone else's food or drink. The appellant also presented evidence of his good military character and his veracity.

Discussion. The test for legal sufficiency requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In this case there are but two elements: that the appellant used methamphetamine, and that the use was wrongful. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 37b(2). Both elements, however, contain a knowledge requirement. *United States v. Mance*, 26 M.J. 244, 253-54 (C.M.A. 1988).

> Knowledge of the presence of a controlled substance is a required component of use. Knowledge of the presence of a controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge.

MCM, Part IV, ¶ 37c(10). The recent decision of our Superior Court, in *Campbell*, significantly modified the conditions under which the Government may rely upon this permissive inference.

Although *Campbell* dealt with lysergic acid diethylamide and the reliability of the testing methodology employed in that case, we do not believe that *Campbell* can be limited to its facts. Prior to *Campbell* it was well established that the trier of fact could draw a permissive inference of wrongful drug use based on a positive urinalysis. *United States v. Pabon*, 42 M.J. 404, 405-06 (1995). *Campbell*, however, provides that the "prosecution cannot rely solely on the presence in the body of the drug or its constituent elements." *Campbell*, 50 M.J. at 160. It further provides that where the prosecution intends to rely upon this inference, the Government must "establish the reliability of the testing methodology and explain the significance of the results of the test of the accused's sample." *Id.* This is normally done through the testimony of an expert witness. When such a witness is called:

> The prosecution's expert testimony must show: (1) that the "metabolite" is "not naturally produced by the body" or any substance other than the drug in question . . . (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug," . . . and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.

Id. (citations and internal quotes omitted).

In the appellant's case, the Government adequately established that methamphetamine does not naturally occur in the human body, and that the test results were reliable. We find, however, that the testimony of Dr. Czarny did not establish that the cutoff level and the appellant's nanogram level were sufficient to discount unknowing use and to indicate that the appellant experienced the physical and psychological effects of the drug. Additionally, no other evidence presented was sufficient to permit the prosecution to rely upon the inference. *See Campbell*, 52 M.J. at 388-389. Since the prosecution is not entitled to rely upon the presumption of knowing use in this case, and since it did not present any other direct or circumstantial evidence of knowing use, we find that the evidence is legally insufficient to prove the first element of the offense. *See United States v. Barnes*, ___ M.J. ___, No. 9401927 (N.M.Ct.Crim.App. 31 May 2000).

Conclusion

The findings and sentence are set aside. The Charge and Specification are dismissed. All rights and privileges the appellant lost due to this conviction shall be restored to him.[5] This case is returned to the Judge Advocate General of the Navy for appropriate disposition.

Senior Judge TROIDL and Judge NAUGLE concur.

For the Court

CHRISTINE E. SHEEHY
Clerk of Court (Acting)

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[5] This action moots the remaining five assignments of error.

APPENDIX G

U.S. COURT OF APPEALS FOR THE ARMED FORCES

2001 CAAF LEXIS 808

No. 01-5007

Crim.App. No. 99 00147

Daniel C. MAHONEY
U.S. Navy, *Appellee*

v.

United States, *Appellant*

Decided July 2, 2001

Opinion:

On consideration of the certified issue,* in light of United States v. Green, No. 00-0268, __ MJ __ (2001), we answer the certified issue in the affirmative. Accordingly, it is ordered that the decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further consideration in light of Green.

*WHETHER THE LOWER COURT ERRED WHEN IT FOUND THE GOVERNMENT'S EVIDENCE DID NOT SATISFY THE ALTERNATIVE THEORY OF PROOF DEEMED BY THIS COURT TO BE EQUIVALENT PERSUASIVENESS TO THE THREE PART STANDARD ENUNCIATED BY THIS COURT IN THE CAMPBELL DECISION IN ORDER TO PERMIT THE INFERENCE THAT THE ACCUSED KNOWINGLY AND WRONGFULLY USED A CONTROLLED SUBSTANCE.

DISSENT:

GIERKE, Judge (dissenting): I dissent from the order of the Court.

APPENDIX H

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

W.A. DeCICCO R.H. TROIDL
D.A. ANDERSON

UNITED STATES

v.

Daniel C. MAHONEY
Hull Maintenance Technician Third Class (E-4), U.S. Navy

NMCM 99 00147 Decided 31 May 2000

Sentence adjudged 16 July 1998. Military Judge: R.B. Wities. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Shore Intermediate Maintenance Activity, San Diego, CA.

LT M. ERIC EVERSOLE, JAGC, USNR, Appellate Defense Counsel
Capt DANNY R. FIELDS, USMCR, Appellate Government Counsel

DeCICCO, Chief Judge:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of

using cocaine in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for ten days and a bad-conduct discharge. The convening authority approved the sentence.

In this appeal, the appellant raises three assignments of error. Based on *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000), and *United States v. Barnes*, __ M.J. __, No. 9401927 (N.M.Ct.Crim.App. 31 May 2000), we have concluded that the evidence was legally insufficient to prove the wrongful use of cocaine in this case. This renders discussion of the raised issues unnecessary.

The prosecution's case consisted of a "urinalysis-only" case. In its case-in-chief, the Government called as witnesses the urinalysis observer, the urinalysis coordinator, and the quality assurance officer from the Naval Drug Screening Lab [NDSL], San Diego. It also submitted into evidence documentation establishing that the accused's urine sample had tested positive for the presence of the metabolite of cocaine.

The urinalysis observer testified that he watched the appellant provide a urine sample and that all standard procedures were followed. The urinalysis coordinator testified as to the custody and transfer of the sample to the laboratory for testing the next day. The quality assurance officer from NDSL then testified as to the reliability of the testing procedures at the lab and that there had not been any false positives. He also testified that the metabolite of cocaine is not naturally produced in the body, and that the accused's urinalysis resulted in a reading of 179 nanograms per milliliter [ng/ml] of the metabolite. The Department of

Defense cutoff for this metabolite was 150 for the initial screening test and 100 for the gas chromatograpy/mass spectrometry [GC/MS] test. He opined that the appellant would have ingested cocaine three or four days prior to the urinalysis.

On cross-examination, the quality assurance officer conceded that the test did not indicate how the cocaine got into the appellant's body and that 179 ng/ml was a "small number." Record at 201. He then stated:

> Perhaps the person didn't even experience anything, or it could mean a very large dose three or four days ago, perhaps even a larger dose than the person who had a level of 100,000. Since we don't have any knowledge of the time that has elapsed between the ingestion and the collection of the urine, all we can say is the person took it in the recent past.

Record at 202.

In his defense, the appellant testified that he had not used cocaine. His defense was that his use of the prescription drug robaxin may have caused his urinalysis result. On cross-examination, he admitted that he had stated to others that he may have smoked a cigarette laced with cocaine. He was not asked, and did not say, whether such use was knowing and wrongful or not. He did later state that this was "mere speculation" or "some weird belief that just was out there. It's nothing -- I'm trying to substantiate how this occurred to me. I have no idea. I don't know." Record at 308.

The appellant also called an expert witness who testified that robaxin is a muscle relaxant that may have interfered with the urinalysis test. On cross-examination, however, the trial counsel completely devastated the expert's testimony by having the witness admit that he had never tested urine containing robaxin, that he was not qualified as an expert in the area of forensic drug urinalysis testing and interpretation, that robaxin and the metabolite of cocaine do not have the same molecular weight, and that there was no research anywhere to support the hypothesis that robaxin could cause a false positive for cocaine. The defense expert finally admitted that he would not stake his reputation on the argument that robaxin would cause a false positive for cocaine on a urinalysis test. Record at 243. Finally, the appellant produced evidence as to his good character and truthfulness.

On rebuttal, the prosecution recalled its quality assurance officer to testify that the chemical structures of robaxin and the metabolite of cocaine are dissimilar, and that there is no chance that robaxin could have been mistaken for the metabolite in either the immunoassay or the GC/MS test. Record at 300.

In its first opinion in *Campbell,* the Court of Appeals for the Armed Forces stated:

> Under applicable case law, the prosecution cannot rely solely on the presence in the body of the drug or is constituent elements. The cases which have permitted the inference of wrongfulness strictly require that the prosecution also establish the reliability of the testing methodology and explain the

> significance of the results of the test of the accused's sample. *The prosecution's expert testimony must show: (1) that the "metabolite" is "not naturally produced by the body" or any substance other than the drug in question* [citation omitted]*; (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug"* [citations omitted]; *and (3) that the testing methodology reliable detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.*

Campbell, 50 M.J. at 160. The Court stated that this was well-established case law and did not establish new law. *Id.* at 161 n.2.

In its opinion on reconsideration, the Court stated that the three-part standard does not necessarily constitute the only means of proving knowing use. The prosecution "may" demonstrate the relationship between the test result and the permissive inference of knowing, wrongful use through expert testimony establishing the three factors cited above. *Campbell,* 52 M.J. at 388. The Court ruled, however, that any other means of proof must explain, "with equivalent persuasiveness," the underlying scientific methodology and the significance of the test results, so as to provide a rational basis for drawing the inference of knowing, wrongful use. *Id.*

In this case, the prosecution should not have been able to use the inference of knowing, wrongful use because it did not present evidence to satisfy the second factor in *Campbell*. There was no evidence that the cutoff level (100 ng/ml) and the reported concentration (179 ng/ml) were high enough to reasonably discount the possibility of unknowing ingestion or to indicate the likelihood that the appellant at some time would have experienced the physical and psychological effects of cocaine. In fact, the prosecution's expert stated that the appellant may not have experienced anything.

We also find no other evidence in this record to establish with equivalent persuasiveness the significance of the test results so as to provide a rational basis for drawing the inference of knowing, wrongful use. We view the appellant's testimony that he told others that he may have smoked a cigarette laced with cocaine to be mere speculation and an attempt to explain the test result. There is no evidence that any such use was done with knowledge of the presence of the cocaine in the cigarette.

In view of the absence of such evidence, *Campbell* holds that the prosecution was not entitled to use the inference to prove knowing, wrongful use. Without this inference the evidence at trial was legally insufficient. *See United States v. Barnes*, __ M.J. __, No. 9401927 (N.M.Ct.Crim.App. 31 May 2000). This lack of proof requires us to set aside the appellant's conviction.

Accordingly, the findings and sentence are set aside. The Charge is dismissed.

Senior Judge TROIDL concurs.

ANDERSON, Judge (dubitante):

For the reasons expressed in *United States v. Barnes*, __ M.J. __, No. 9401927 (N.M.Ct.Crim.App. 31 May 2000), I acquiesce in the result.

For the Court

CHRISTINE E. SHEEHY
Clerk of Court (Acting)

APPENDIX I

U.S. COURT OF APPEALS FOR THE ARMED FORCES

2001 CAAF LEXIS 804

No. 01-5001

Crim.App. No. 00 00714

Forest W. MEADOR
U.S. Navy, *Appellee*

v.

United States, *Appellant*

Decided July 2, 2001

Opinion:

On consideration of the certified issue,* in light of United States v. Green, No. 00-0268, __ MJ __ (2001), we answer the certified issue in the affirmative. Accordingly, it is ordered that the decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further consideration in light of Green.

*WHETHER THE LOWER COURT ERRED IN FINDING THE EVIDENCE LEGALLY INSUFFICIENT TO PERMIT THE FACTFINDER TO INFER THE ACCUSED'S KNOWING AND WRONGFUL USE OF MARIJUANA WHERE UNITED STATES V. CAMPBELL STATED IT DID NOT CREATE NEW LAW AND WHERE THE EVIDENCE PRESENTED AT TRIAL WAS AT LEAST THE SAME QUANTUM OF EVIDENCE THIS COURT PREVIOUSLY FOUND LEGALLY SUFFICIENT IN NUMEROUS PRE-CAMPBELL CASES.

DISSENT:

GIERKE, Judge (dissenting): I dissent from the order of the Court.

APPENDIX J

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

W.A. DeCICCO R.R. OZMUN
K.J. NAUGLE

UNITED STATES

v.

Forest W. MEADOR
Private First Class (E-2), U.S. Marine Corps

NMCM 200000714 Decided 26 January 2001

Sentence adjudged 25 February 1999. Military Judge: F.A. Delzompo. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 3d Battalion, 11th Marines, 1st Marine Division (Rein), Twentynine Palms, CA.

LT M. ERIC EVERSOLE, JAGC, USNR, Appellate Defense Counsel
Capt WILLIAM J. COLLINS, JR, USMC, Appellate Government Counsel

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, contrary to his pleas, of a single specification of the wrongful use of marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The approved sentence includes confinement for 90 days, forfeiture of $639 pay per month for three months, reduction to pay grade E-1, and a bad-conduct discharge.

We have carefully reviewed the record of trial, the appellant's assignment of error, and the Government's response. Following our review pursuant to Articles 59(a) and 66(c), UCMJ, we find error that materially prejudiced the appellant's substantial rights.

Legal and Factual Sufficiency

In his sole assignment of error, the appellant challenges the legal and factual sufficiency of the evidence in support of his conviction for the use of marijuana. In support of his position, the appellant relies upon *United States v. Campbell*, 50 M.J. 154 (1999). We note that that decision was *supplemented on reconsideration*, 52 M.J. 386 (2000). Based upon our understanding of the *Campbell* decision, we are compelled to agree with the appellant that the evidence is legally insufficient in this case.

Facts. The appellant was attached to "Lima" Battery, 3d Battalion, 12th Marines, located at Marine Corps Air Ground Combat Center at Twentynine Palms, CA. On 17 November 1998, he responded to a call for a random command urinalysis screening of his entire unit and provided a urine sample. The sample he provided on that date was collected under standard procedures and forwarded to the Navy Drug Screening Laboratory [NDSL]

in San Diego, CA, to be tested for the presence of drugs. Shortly thereafter, the NDSL reported a positive result of that test for tetrahydrocannibinol [THC], the metabolite for marijuana. The metabolite was found in a concentration of 22 nanograms per milliliter of 9-carboxy-THC. Record at 67, Prosecution Exhibit 1 at 30.

The Government presented the testimony of First Lieutenant [1Lt] Lehane, who observed the collection procedures of the appellant's urine sample. 1Lt Lehane testified concerning the collection procedures and the chain of custody, and the procedures used in observing the appellant provide a sample.[1] This same individual testified concerning his observation of the appellant providing a sample. The Government also called Staff Sergeant Lauer. He was the SACO coordinator on the date of the unit sweep. He also testified concerning the procedures used and the chain of custody of the appellant's urine sample. Finally, Mr. Czarny, a biochemist from the NDSL where the urine was tested, testified concerning the laboratory procedures used to test the sample, and that the appellant's sample tested positive for THC. Through this evidence the Government established that the appellant's urine sample was properly collected and that the results of the testing procedures in the NDSL were reliable.

In fact, the appellant's urine sample of 17 November tested positive on three separate tests conducted by the

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[1] Although 1Lt Lehane could not specifically recall observing the appellant provide a urine sample on 17 November 1998, he did recall having observed the appellant do so in the past. Additionally, he identified his signature on Prosecution Exhibit 2, indicating that he observed the appellant provided a sample. Prosecution Exhibit 2 is dated 17 November 1998. Record at 21-22.

NDSL. The first two tests were screening tests using a radio-immunoassay procedure. Following positive results on both of those tests, a confirmatory test was performed using the gas chromatography/mass spectrometry [GC/MS] test. This confirmatory test revealed a reading of 22.2 ng/mL. This was above the DoD cut-off level of 15 nanograms. Mr. Czarny also testified that THC does not naturally occur in the human body and that marijuana is the only substance that would cause THC to be found in urine. Record at 47. He also testified that in someone who is a heavy user of marijuana, THC could be detected at the cut-off levels a week to a week-and-a-half after it was last used. *Id.* at 48. Mr. Czarny did not testify that based on the results of the test that he could conclude that the appellant felt the effects of the marijuana or that he could rule out the possibility of innocent ingestion. The appellant presented no evidence on the merits. At trial he argued that there were problems in both the collection and the testing procedures, and that the Government had failed to establish an adequate chain of custody, and thus there was no way of knowing whether the urine sample was actually the appellant's.

Discussion. The test for legal sufficiency requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In this case there are but two elements: that the appellant used marijuana, and that the use was wrongful. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 37b(2). Both elements, however, contain a knowledge

requirement. *United States v. Mance*, 26 M.J. 244, 253-54 (C.M.A. 1988).

> Knowledge of the presence of a controlled substance is a required component of use. Knowledge of the presence of a controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge.

MCM, Part IV, ¶ 37c(10). The recent decision of our superior court, in *Campbell*, significantly modified the conditions under which the Government may rely upon this permissive inference.

Although *Campbell* dealt with lysergic acid diethylamide and the reliability of the testing methodology employed in that case, we do not believe that *Campbell* can be limited to its facts. Prior to *Campbell* it was well established that the trier of fact could draw a permissive inference of wrongful drug use based on a positive urinalysis. *United States v. Pabon*, 42 M.J. 404, 406-07 (1995). *Campbell*, however, provides that the "prosecution cannot rely solely on the presence in the body of the drug or its constituent elements." *Campbell*, 50 M.J. at 160. It further provides that where the prosecution intends to rely upon this inference, the Government must "establish the reliability of the testing methodology and explain the significance of the results of the test of the accused's sample." *Id.* This is normally done through the testimony of an expert witness. When such a witness is called:

> The prosecution's expert testimony must show: (1) that the "metabolite" is "not naturally produced by the body" or any substance other than the drug in question; (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug [;]" and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.

Id. (citations omitted).

In the appellant's case, the Government adequately established that THC does not naturally occur in the human body, and that the result of the urine test was reliable. We find, however, that the testimony of Mr. Czarny did not establish that the cutoff level and the appellant's nanogram level were sufficient to discount unknowing use and to indicate that the appellant experienced the physical and psychological effects of the drug. Additionally, no other evidence presented was sufficient to permit the prosecution to rely upon the inference. *See Campbell*, 52 M.J. at 388-89. Since the prosecution is not entitled to rely upon the presumption of knowing use in this case, and since it did not present any other direct or circumstantial evidence of knowing use, we find that the evidence is legally insufficient to prove the first element of the offense. *See*

United States v. Barnes, 53 M.J. 624 (N.M.Ct.Crim.App. 2000).

Conclusion

The findings and sentence are set aside. The Charge and Specification thereunder are dismissed. All rights and privileges the appellant lost due to this conviction shall be restored to him. This case is returned to the Judge Advocate General of the Navy for appropriate disposition.

For the Court

R.H. TROIDL
Clerk of Court

APPENDIX K

U.S. COURT OF APPEALS FOR THE ARMED FORCES

2001 CAAF LEXIS 810

No. 01-5009

Crim.App. No. 99 1162

Earl A. POWE
U.S. Marine Corps, *Appellee*

v.

United States, *Appellant*

Decided July 2, 2001

Opinion:

On consideration of the certified issue,* in light of United States v. Green, No. 00-0268, __ MJ __ (2001), we answer the certified issue in the affirmative. Accordingly, it is ordered that the decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further consideration in light of Green.

*WHETHER THE LOWER COURT ERRED WHEN IT FOUND THE GOVERNMENT'S EVIDENCE DID NOT SATISFY THE ALTERNATIVE THEORY OF PROOF DEEMED BY THIS COURT TO BE EQUIVALENT PERSUASIVENESS TO THE THREE PART STANDARD ENUNCIATED BY THIS COURT IN THE CAMPBELL DECISION IN ORDER TO PERMIT THE INFERENCE THAT THE ACCUSED KNOWINGLY AND WRONGFULLY USED A CONTROLLED SUBSTANCE.

DISSENT:

GIERKE, Judge (dissenting): I dissent from the order of the Court.

APPENDIX L

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

W.A. DeCICCO R.H. TROIDL
D.A. ANDERSON

UNITED STATES

v.

Earl A. POWE
Lance Corporal (E-3), U.S. Marine Corps

NMCM 99 01162 Decided 31 May 2000

Sentence adjudged 13 November 1998. Military Judge: K.B. Martin. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters Battalion, Marine Corps Air Ground Combat Center, Twentynine Palms, CA.

LT M. ERIC EVERSOLE, JAGC, USNR, Appellate Defense Counsel
Capt EDWARD C. DURANT, USMC, Appellate Government Counsel

TROIDL, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of a single

specification of failing to go to his appointed place of duty in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was convicted, contrary to his pleas, of making a false official statement, and the wrongful use of methamphetamine, in violation of Articles 107 and 112a, UCMJ, 10 U.S.C. §§ 907 and 912a. He was sentenced to a bad-conduct discharge, 30 days confinement, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

We have carefully reviewed the record of trial, the appellant's two assignments of error, the Government's response, and the appellant's reply brief. After taking corrective action, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

In 1998, the appellant was a bus driver and dispatcher assigned to Headquarters Battalion, Marine Corps Air Ground Combat Center, Twentynine Palms, California. He suffered from a respiratory ailment which he described as asthma, but which he said the Marine Corps called bronchitis so that he would not require a medical discharge. He was described as the number 1 of 5 lance corporals in his unit, but counseling for various perceived deficiencies led to his not being recommended for promotion to corporal during the second and third quarters of calendar year 1998.

On 20 July 1998, the appellant provided a urine specimen as part of a random urinalysis conducted by his unit. That sample tested positive for the presence of

methamphetamine. When his unit was informed of the test results by the laboratory, the appellant was called to the Criminal Investigations Division (CID) for an interview. On 6 August 1998, after having been properly informed of his rights under Article 31, UCMJ, and having waived those rights, the appellant was interviewed by Staff Sergeant (SSgt) Reall concerning his alleged use of methamphetamine. A statement signed by the appellant following this interview formed the basis for the false official statement charge.

The Government's first witness was SSgt Reall, who testified concerning the taking of the appellant's statement on 6 August 1998. SSgt Reall testified that upon completion of the interview, he prepared a written statement for the appellant. After reading the statement, making desired changes, and initialing each paragraph, the appellant was sworn and signed the statement. Prosecution Exhibit 6. In it, the appellant claimed that he had been taking three over-the-counter medications (Nyquil, Dayquil, and Primatene Mist) and one prescription medication (Preventalin) prior to the urinalysis to treat his asthma and a cold. He stated that the prescription drug had been given to him by his mother and was not in his medical record. Noting that he had tested positive twice in the past (both pre-service) and knowing that the medications would cause him to test positive this time also, the appellant stated that he told Corporal (Cpl) Leuth, the urinalysis coordinator, that he had been taking prescription drugs for his asthma and cold. He also stated that he had prepared a list of the drugs he was using and attempted to give it to her; that she refused to take the list or copy it into the urinalysis log; and, that she told him that "If they are not prescribed by the military then (I) can not list them." Prosecution Exhibit 6

at 2. The appellant denied using any illegal drugs or methamphetamines. SSgt Reall also testified that, following the interview, he had reviewed the appellant's military medical record and had not found "any prescription or mention of prescription or an asthma inhaler or asthma type of medication. . . ." Record at 36.

On cross-examination, SSgt Reall testified that he understood the appellant to be claiming the positive urinalysis test was the result of his having used the over-the-counter and prescription drugs. He acknowledged, however, that the appellant's statement does not include an explicit claim to that effect. SSgt Reall also acknowledged that, with respect to the two pre-service positive urinalysis tests, the appellant had not named the substance(s) for which he had tested positive.

The Government then called Cpl Leuth, who described the methodology followed during the 20 July 1998 urinalysis. She also testified that when she asked the appellant whether he was taking any medications, "(h)e looked at me and kind of smiled and said, not really. I asked him if it was in his medical record, and he said no. Then I told him then you're not taking any medications if it's not in (your) medical record, and he said okay." Record at 47. Nothing was entered in the medication section of the urinalysis log with respect to the appellant's sample, and he did not tell her what medications he was taking. *Id.*

Sergeant (Sgt) Keels testified next as the observer assigned to the appellant during the urinalysis. He explained the procedures he followed and recalled that the appellant had not been able to provide a sufficient quantity

of urine at first, but was able to do so within 90 minutes after drinking a quantity of water. Gunnery Sergeant Newell, the Battalion Substance Abuse Program Officer, then testified concerning the packaging and mailing of the appellant's sample to the drug screening laboratory.

The Government's final witness on the merits was Mr. Robert Czarny, a chemist responsible for Quality Assurance at the Navy Drug Screening Laboratory in San Diego. During his testimony, Mr. Czarny identified, and the Government introduced into evidence, the laboratory report concerning the appellant's urine specimen provided on 20 July 1998. Prosecution Exhibit 7. After discussing the various internal security features at the laboratory, Mr. Czarny explained the testing procedure itself with respect to the appellant's specimen. He testified that the first screening test was an immunoassay and the result indicated that the specimen exceeded 100% of the cutoff level for detecting methamphetamine and thus was labeled as a presumptive positive test. The specimen was screened a second time, again by immunoassay, and this time tested at greater than 150% of the cutoff level for methamphetamine.

A third test was then run utilizing the gas chromatography-mass spectrometry (GCMS), which Mr. Czarny described as the "national requirement for forensic drug testing." Record at 79. This test confirmed the presence of methamphetamine in the specimen and quantified the level at 589 nanograms per milliliter. The test also revealed the presence of amphetamine at 310 nanograms per milliliter. The Department of Defense cutoff level for reporting a specimen as positive for methamphetamine and amphetamine is 500 nanograms per milliliter, thus the appellant's sample was only reported as positive for

methamphetamine. Mr. Czarny testified that the cutoff level is tied to the sensitivity of the equipment and ensures that the same result would be achieved at each of the screening laboratories.

Mr. Czarny testified that methamphetamine does not appear naturally in the body, and that the test results indicating the presence of both methamphetamine and amphetamine could mean the person ingested both drugs, or just methamphetamine, since the body converts a portion of ingested methamphetamine into amphetamine. He then described a fourth test performed in the case of all methamphetamine positive specimens. He explained that a chiral analysis is performed to establish the geometric form of the methamphetamine since the "left-handed" form of the drug is available over-the-counter in medications, such as the Vicks inhaler, and is not a controlled substance. The methamphetamine known as the "right-handed" form is a controlled substance. He explained that a specimen is only confirmed as positive for methamphetamine if the chiral analysis reflects that over 20% of the methamphetamine quantified in the specimen is the right-handed form. The appellant's specimen tested as 95% for the right-handed form. He then testified that there are no over-the counter medications that will cause urine to test positive for the right-handed form of methamphetamine, including Nyquil, Dayquil, and Primatene Mist. In addition, neither prescription Proventil or Albuterol will cause urine to test positive for the right-handed form of methamphetamine. Mr. Czarny was aware of only one prescription drug available in the United States (Benzphetamine - an anorectic for weight loss) that would show positive for the right-handed form of methamphetamine, and knew of only six such drugs available internationally.

On cross-examination, after testifying concerning the accuracy of the GCMS with respect to the quantification of methamphetamine in a specimen, Mr. Czarny stated that he had seen a specimen with a nanogram per milliliter level of 300,000. When asked if someone would necessarily know that they had taken methamphetamine, he responded that it would depend on the dose. He then testified that although pure methamphetamine would have an acrid taste, a person would not taste small amounts of it in food or drink.

After the Government rested, the defense called two witnesses who testified as to the appellant's outstanding military character. One of the witnesses, the appellant's supervisor, indicated that he had sent the appellant for treatment of asthma and had seen the appellant with an inhaler. This witness was not aware that the appellant had not been prescribed medication for asthma. The defense then rested.

Factual and Legal Sufficiency

Both of the appellant's assignments of error contest the factual and legal sufficiency of the evidence relating to the two charges to which he pled not guilty.[1] The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

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[1] I. THE EVIDENCE WAS FACTUALLY AND LEGALLY INSUFFICIENT TO PROVE APPELLANT KNOWINGLY AND WRONGFULLY USED METHAMPHETAMINE.

II. THE EVIDENCE WAS FACTUALLY AND LEGALLY INSUFFICIENT TO PROVE APPELLANT MADE A FALSE OFFICIAL STATEMENT.

beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). When applying this test, we are bound to draw every reasonable inference from the record in favor of the prosecution. *United States v. McGinty*, 38 M.J. 131 (C.M.A. 1993). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses . . . [we are ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ.

Wrongful Use of Methamphetamine

With respect to the wrongful use of methamphetamine charge, the appellant asserts that the Government failed to prove beyond a reasonable doubt that he knowingly and wrongfully used this controlled substance. In support of his argument, the appellant cites the recent case of *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000).

In order to convict an individual of a violation of Article 112a, UCMJ, the Government must prove beyond a reasonable doubt: (a) that the accused used a controlled substance; and, (b) that the use by the accused was wrongful. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 37b(2).

> When the only evidence of drug use consists of a report of a test identifying the presence of the drug or a metabolite in the accused's body fluids, knowledge of the presence of the

> controlled substance may be inferred if the prosecution presents "expert testimony explaining the underlying scientific methodology and the significance of the test result, so as to provide a rational basis for inferring that the substance was knowingly used and that the use was wrongful." 50 M.J. at 159 (internal quotation marks omitted). *See United States v. Graham*, 50 M.J. 56, 58-59 (1999), *United States v. Harper*, 22 M.J. 157 (1986), *United States v. Murphy*, 23 M.J. 310 (1987), and *United States v. Ford*, 23 M.J. 331 (1987).

Campbell, 52 M.J. at 388. Our superior court recently held that:

> [T]he prosecution may demonstrate the relationship between the test result and the permissive inference of knowing, wrongful use through expert testimony showing: "(1) that the 'metabolite' is 'not naturally produced by the body' or any substance other than the drug in question"; (2) "that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have 'experienced the physical and psychological effects of the drug'"; and (3) "that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample." 50 M.J. at 160.

Id. The court went on to hold that:

> If the Government relies upon test results, it is not precluded from using evidence other than the three-part standard if such evidence can explain, with equivalent persuasiveness, the underlying scientific methodology and the significance of the test results, so as to provide a rational basis for inferring knowing, wrongful use. Such evidence must be supported by more than an expert's qualifications and generalized theories. It must meet applicable evidentiary standards for scientific and specialized knowledge in terms of reliability and relevance to the specific proposition at issue. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993) (scientific testimony must be both reliable and relevant); *General Electric Co. v. Joiner*, 522 U.S. 136, 144-45, 118 S. Ct. 512, 518, 139 L. Ed. 2d 508 (1997)(an expert's opinions must be "sufficiently supported" by the "studies on which they purport to rely"); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 1177, 143 L. Ed. 2d 238 (1999) (focusing not simply on the reasonableness in general of an expert's approach but also on the particular matter to which the expert's testimony was directly relevant).

Id. at 388-89.

In this case, we find that the Government has met the first and third prongs of the *Campbell* test, but failed to meet the second prong.[2] Additionally, we find that the Government did not introduce evidence at trial that explained with equivalent persuasiveness the underlying scientific methodology and the significance of the test results so as to provide a rational basis for inferring knowing, wrongful use. *United States v. Barnes*, ___ M.J. ___, No. 9401927 (N.M.Ct.Crim.App. 31 May 2000)(slip op. at 6). Accordingly, we must find that the evidence is not legally sufficient to sustain the findings of guilty as to the wrongful use of methamphetamine, Charge III and its Specification. We will take corrective action in our decretal paragraph.

Making a False Official Statement

To sustain a conviction for making a false official statement, the Government must prove beyond a reasonable doubt: (1) that the accused signed a certain official document or made a certain official statement; (2) that the document or statement was false in certain particulars; (3) that the accused knew it to be false at the time of signing it or making it; and, (4) that the false document or statement was made with the intent to deceive. MCM, Part IV, ¶ 31b (1998 ed.). As with each element, the Government bears the burden of proving beyond a reasonable doubt that the accused actually knew the statement was false. *United States v. Acosta*, 19 C.M.A.

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[2] We note that Mr. Czarny's testimony is not unlike that of the expert in *United States v. Pabon*, 42 M.J. 404, 406 (1995). There, the expert admitted that the nanogram level in Pabon's specimen was "consistent with the possibility of unknowing ingestion" and that his nanogram level could be produced by giving "a small enough dose without their [the user's] knowledge and with no sufficient physiological or psychological symptoms." *Pabon*, 42 M.J. at 406.

341, 41 C.M.R. 341, 343 (1970); MCM, Part IV, ¶ 31c(5) (1998 ed.). An honest belief in the truth of a statement tends to negate the existence of the intent to deceive. *Acosta*, 41 C.M.R. at 343; *United States v. Nelson*, 52 M.J. 516, 526 (N.M.Ct.Crim.App. 1999), *rev. granted*, __ M.J. __, No. 00-0010 (C.A.A.F. February 2, 2000).

The alleged false official statement made by the appellant in this case was "that he had not used methamphetamine and that he would test positive because of the medications he was currently taking." Charge Sheet. Having found that the evidence was legally insufficient to support the finding that the appellant had wrongfully used methamphetamine, we must also necessarily find that the Government's evidence is legally insufficient to prove beyond a reasonable doubt that his statement that he had not used methamphetamine was false or that he knew it was false. Additionally, there is no legally sufficient evidence in the record to prove beyond a reasonable doubt that the appellant knew the medications he was taking would not cause him to test positive on the urinalysis. We will take corrective action in our decretal paragraph.

Conclusion

Accordingly, we set aside the findings of guilty of Charges II and III and the Specifications thereunder, and dismiss those Charges and Specifications. We affirm the remaining findings of guilty (Charge I and its Specification) as approved below. We have reassessed the sentence under the principles contained in *United States v. Peoples*, 29 M.J. 426, 428-29 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Upon reassessment, and specifically considering the maximum authorized punishment

in this case (confinement for one month, forfeiture of 2/3 pay for one month, and reduction to pay grade E-1), the nature of the remaining offense committed by the appellant, the testimony of his two character witnesses, and the absence of any prior disciplinary actions, we approve only so much of the sentence as provides for reduction to pay grade E-2. *See United States v. Cook*, 48 M.J. 434 (1998); Art. 66(c), UCMJ.

Chief Judge DeCICCO concurs.

ANDERSON, Judge (*dubitante*):

I acquiesce in accordance with my previously expressed views in *United States v. Barnes*, ___ M.J. ___, No. 9401927 (N.M.Ct.Crim.App. 31 May 2000)(slip op. at 6).

For the Court

CHRISTINE E. SHEEHY
Clerk of Court (Acting)

APPENDIX M

U.S. COURT OF APPEALS FOR THE ARMED FORCES

2001 CAAF LEXIS 812

No. 01-5011

Crim.App. No. 99 00374

Timothy T. RYAN
U.S. Navy, *Appellee*

v.

United States, *Appellant*

Decided July 2, 2001

Opinion:

On consideration of the certified issue,* in light of United States v. Green, No. 00-0268, __ MJ __ (2001), we answer the certified issue in the affirmative. Accordingly, it is ordered that the decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further consideration in light of Green.

*WHETHER THE LOWER COURT ERRED IN FINDING THE EVIDENCE LEGALLY INSUFFICIENT TO PERMIT THE FACTFINDER TO INFER THE ACCUSED'S KNOWING AND WRONGFUL USE OF MARIJUANA WHERE UNITED STATES V. CAMPBELL STATED IT DID NOT CREATE NEW LAW AND WHERE THE EVIDENCE PRESENTED AT TRIAL WAS AT LEAST THE SAME QUANTUM OF EVIDENCE THIS COURT PREVIOUSLY FOUND LEGALLY SUFFICIENT IN NUMEROUS PRE-CAMPBELL CASES.

DISSENT:

GIERKE, Judge (dissenting): I dissent from the order of the Court.

APPENDIX N

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

R.B. LEO D.A. ANDERSON
K.J. NAUGLE

UNITED STATES

v.

Timothy T. RYAN
Staff Sergeant (E-6), U.S. Marine Corps

NMCM 99 00374 Decided 8 August 2000

Sentence adjudged 7 May 1998. Military Judge: R.L. Rodgers. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Corps Detachment, Fort Lee, VA.

LT MICHAEL A. CASTELLI, JAGC, USNR, Appellate Defense Counsel
Capt EDWARD C. DURANT, USMC, Appellate Government Counsel

PER CURIAM:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of a single specification alleging the wrongful use of cocaine, in

violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The adjudged sentence included restriction for 60 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended all confinement for 12 months from the date of trial.

We have carefully reviewed the record of trial, the appellant's initial[1] and supplemental[2] assignments of error, and the Government's responses. Applying the decision of our superior court in *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000), we find that the evidence was legally insufficient in this case.[3]

Legal Sufficiency

The appellant contested his guilt of the single allegation of using cocaine, and the prosecution case-in-chief consisted solely of testimony and exhibits related to the conduct and results of a urinalysis to which the appellant was properly subjected. The prosecution called three witnesses: the urinalysis coordinator who issued the specimen bottles to each servicemember, collected the personal data that was recorded on the specimen bottles, and sealed and mailed each box of specimens to the laboratory; the observer who was with each servicemember

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[1] THE FINDING OF GUILT TO THE CHARGE AND ITS SOLE SPECIFICATION IS LEGALLY AND FACTUALLY INSUFFICIENT.

[2] THE URINALYSIS EVIDENCE THE GOVERNMENT PRESENTED TO CONVICT SSGT RYAN OF WRONGFUL USE OF COCAINE WAS FACTUALLY INSUFFICIENT.

[3] In view of our resolution of the legal suffering issue, we need not consider the issue of factual sufficiency.

as specimens were collected in the bottles; and a toxicologist from the Naval Drug Screening Laboratory at Great Lakes, whom the Government qualified as an expert witness, who testified about procedures in the lab and the significance of the testing.

The expert witness from the lab indicated that the appellant's specimen had been confirmed by 100 per cent accurate GC/MS testing to contain 148 nanograms per milliliter (nG/mL) of the cocaine metabolite benzoylecgonine (BZE), that the Government cut-off level for a positive test to BZE is 100 nG/mL, that BZE is not naturally produced in the human body, and that it is not possible for urine to contain BZE without cocaine having been ingested by the donor of the specimen tested. The expert testified that based on the nG/mL of BZE contained in the urine, he could not precisely determine when prior to providing the specimen the donor of the specimen might have ingested the cocaine, but expressed the opinion that it could have been within two-and-a-half to four days beforehand. Of greatest concern, the expert presented no testimony concerning whether the appellant would have experienced any physical or psychological effects following the ingestion of cocaine that would form a rational basis for inferring that the use was knowing and wrongful. *United States v. Campbell*, 52 M.J. 386 (2000).

Under the state of the evidence of record, we conclude that the inference of knowing wrongful ingestion was not available to support the Government's proof of the offense. Considering the remaining evidence in the absence of such permissive inference, we conclude that the evidence is legally insufficient to prove the appellant's guilt beyond a

reasonable doubt. *United States v. Barnes*, 53 M.J. 624 (N.M.Ct.Crim.App. 2000).

Accordingly, the findings and the sentence are set aside. The Charge and its Specification are dismissed.

ANDERSON, Judge (*dubitante*):

For the reasons that I expressed in *United States v. Barnes*, 53 M.J. 624, 628-30 (N.M.Ct.Crim.App. 2000), I acquiesce in the result.

For the Court

R.H. TROIDL
Clerk of Court

APPENDIX O

U.S. COURT OF APPEALS FOR THE ARMED FORCES

2001 CAAF LEXIS 809

No. 01-5008

Crim.App. No. 99 01134

Joshua L. SHELHART
U.S. Navy, *Appellee*

v.

United States, *Appellant*

Decided July 2, 2001

Opinion:

On consideration of the certified issue,* in light of United States v. Green, No. 00-0268, __ MJ __ (2001), we answer the certified issue in the affirmative. Accordingly, it is ordered that the decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further consideration in light of Green.

*WHETHER THE LOWER COURT ERRED IN FINDING THE EVIDENCE LEGALLY INSUFFICIENT TO PERMIT THE FACTFINDER TO INFER THE ACCUSED'S KNOWING AND WRONGFUL USE OF MARIJUANA WHERE UNITED STATES V. CAMPBELL STATED IT DID NOT CREATE NEW LAW AND WHERE THE EVIDENCE PRESENTED AT TRIAL WAS AT LEAST THE SAME QUANTUM OF EVIDENCE THIS COURT PREVIOUSLY FOUND LEGALLY SUFFICIENT IN NUMEROUS PRE-CAMPBELL CASES.

DISSENT:

GIERKE, Judge (dissenting): I dissent from the order of the Court.

APPENDIX P

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

W.A. DeCICCO R.H. TROIDL
D.A. ANDERSON

UNITED STATES

v.

Joshua L. SHELHART
Private First Class (E-2), U.S. Marine Corps

NMCM 99 01134 Decided 31 May 2000

Sentence adjudged 4 August 1998. Military Judge: T.J. Hamilton II. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters Battalion, 2d Marine Division, U.S. Marine Forces, Atlantic, Camp Lejeune, NC.

LT M. ERIC EVERSOLE, JAGC, USNR, Appellate Defense Counsel
Capt EDWARD C. DURANT, USMC, Appellate Government Counsel

DeCICCO, Chief Judge:

A military judge sitting as a special court-martial convicted the appellant, in accordance with his pleas, of a

six-month unauthorized absence terminated by apprehension in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was also convicted, contrary to his pleas, of the wrongful use of marijuana in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 100 days, forfeiture of $ 600 pay per month for 3 months, and reduction to pay grade E-1.

Citing *United States v. Campbell,* 50 M.J. 154 (1999), *supplemented on reconsideration,* 52 M.J. 386 (2000), the appellant raises the single assignment of error in this appeal, that the evidence was insufficient to prove he knowingly and wrongfully used marijuana. After careful examination of the record, we agree.

The prosecution called four witnesses. The first three, the urinalysis observer, the urinalysis coordinator, and the urinalysis clerk, described the taking of the appellant's urine sample and its handling and forwarding to the drug laboratory. Nothing unusual occurred in this process, and the appellant does not challenge this portion of the case. The fourth witness, Lieutenant Kenneth Taylor, U.S. Navy, testified he was a biochemist at the Navy Drug Screening Laboratory [NDSL] in Jacksonville, Florida. His particular duties as assistant technical director included ensuring that the urine samples were tested within Department of Defense guidelines and reviewing test data to ensure the samples were tested appropriately and accurately. He said the laboratory was subject to periodic inspections and had always been found to produce forensically accurate and sound urinalysis test results. In fact, the laboratory had never reported out a "false positive," the reporting of a sample as positive for a drug when in fact it did not contain it.

LT Taylor described the routine procedure of handling the samples once they arrived at the NDSL and the subsequent testing, which included two immunoassay tests and a gas chromatography/ mass spectrometry test. The first two are screening tests that disclosed a reading above the Department of Defense cut-off level of 15 nanograms per milliliter (ng/ml) for the metabolite of marijuana. The third disclosed an exact reading for the appellant's sample of 19 ng/ml. He stated that the metabolite for marijuana (THC) is not produced by the human body and is a product of cannabis sativa or marijuana. He stated that THC cannot be mistaken for any other drug or any other drug metabolite. He testified that the Department of Defense established cut-off levels "to rule out things such as innocent ingestion and also to provide a sufficient window for detection time of drug abuse by service members." Record at 90.[1] His opinion was that THC ingestion had occurred.

On cross-examination, LT Taylor admitted that a reading of 19 ng/ml was a relatively low amount. He stated that he could draw no conclusions from it except that marijuana ingestion had occurred. The defense presented no evidence to the court-martial on the marijuana charge, and the military judge convicted the appellant of that charge.

In its first opinion in *Campbell*, the Court of Appeals for the Armed Forces stated:

> Under applicable case law, the prosecution cannot rely solely on the presence in the body of the drug or its constituent elements. The cases which have permitted the inference of wrongfulness strictly require that the

[1] This testimony is contrary to opinions submitted in affidavits in *Campbell* and the opinions of experts in other cases.

> prosecution also establish the reliability of the testing methodology and explain the significance of the results of the test of the accused's sample. The prosecution's expert testimony must show: (1) that the "metabolite" is "not naturally produced by the body" or any substance other than the drug in question [citation omitted]; (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug" [citation omitted]; and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.

Campbell, 50 M.J. at 160. The Court stated that this was well-established case law and did not establish new law. *Id.* at 161 n.2.

In its opinion on reconsideration, the Court stated that the prosecution "may" demonstrate the relationship between the test result and the permissive inference of knowing, wrongful use through expert testimony establishing the three factors cited above, and the three-part standard does not necessarily constitute the only means of proving knowing use. *Campbell*, 52 M.J. at 388. Any other means of proof, however, must explain, with equivalent persuasiveness, the underlying scientific methodology and the significance of the test results, so as to provide a

rational basis for drawing the inference of knowing, wrongful use. *Id.*

In this case, the prosecution presented expert testimony satisfying the first and third factors. However, the testimony on the second factor was inadequate. While LT Taylor testified that the cutoff level was set to rule out "innocent ingestion" cases, he did not testify that there was any reasonable likelihood that the appellant, or any person with a reading of 19 ng/ml of THC, would have experienced the physical and psychological effects of the drug. In fact, when directly asked, he could only state that marijuana had been ingested, and that he could reach no other conclusions. This testimony does not satisfy the requirements of *Campbell,* and there is no other evidence in this record that would establish, with equivalent persuasiveness, any rational basis for drawing the inference of knowing, wrongful use of marijuana.

In the absence of such expert testimony, or equally persuasive evidence, the prosecution was not entitled to the benefit of the inference of knowing, wrongful use of marijuana. Without this inference, the prosecution's evidence was lacking on a required element of the offense, and was therefore legally insufficient. This requires us to set aside the appellant's conviction of marijuana use. *See United States v. Barnes*, 53 M.J. 624, 2000 CCA LEXIS 129 (N.M.Ct.Crim.App. 2000).

Accordingly, the findings of guilty to Charge II and its Specification are set aside and ordered dismissed. The remaining findings of guilty are affirmed. On reassessment of the sentence, and applying the principles of *United States v. Cook*, 48 M.J. 434, 438 (1998) and *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986), we affirm only so much of the sentence as includes a bad-conduct discharge,

confinement for 50 days, forfeiture of $ 600 pay per month for two months, and reduction to pay grade E-1.

Senior Judge TROIDL concurs.

ANDERSON, Judge (dubitante):

For the reasons expressed in *United States v. Barnes*, 53 M.J. 624, 2000 CCA LEXIS 129 (N.M.Ct.Crim.App. 2000); I acquiesce in the result

For the Court

CHRISTINE E. SHEEHY
Clerk of Court (Acting)

APPENDIX Q

U.S. COURT OF APPEALS FOR THE ARMED FORCES

2001 CAAF LEXIS 806

No. 01-5003

Crim.App. No. 99 01146

Jeremy R.STARK
U.S. Marine Corps, *Appellee*

v.

United States, *Appellant*

Decided July 2, 2001

Opinion:

On consideration of the certified issue,* in light of United States v. Green, No. 00-0268, __ MJ __ (2001), we answer the certified issue in the affirmative. Accordingly, it is ordered that the decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further consideration in light of Green.

*WHETHER THE LOWER COURT ERRED IN FINDING THE EVIDENCE LEGALLY INSUFFICIENT TO PERMIT THE FACTFINDER TO INFER THE ACCUSED'S KNOWING AND WRONGFUL USE OF MARIJUANA WHERE UNITED STATES V. CAMPBELL STATED IT DID NOT CREATE NEW LAW AND WHERE THE EVIDENCE PRESENTED AT TRIAL WAS AT LEAST THE SAME QUANTUM OF EVIDENCE THIS COURT PREVIOUSLY FOUND LEGALLY SUFFICIENT IN NUMEROUS PRE-CAMPBELL CASES.

DISSENT:

GIERKE, Judge (dissenting): I dissent from the order of the Court.

APPENDIX R

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

W.A. DeCICCO D.A. ANDERSON
C.A. PRICE

UNITED STATES

v.

Jeremy R. STARK
Private First Class (E-2), U.S. Marine Corps

NMCM 99 01146 Decided 13 February 2001

Sentence adjudged 17 July 1998. Military Judge: C.E. Dougherty. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, School of Infantry, Marine Combat Training Battalion, Camp Lejeune, NC.

LCDR ROBERT C. KLANT, JAGC, USN, Appellate Defense Counsel
Capt WILLIAM J. COLLINS, JR., USMC, Appellate Government Counsel

DeCICCO, Chief Judge:

This is another case in which a court-martial convicted a military accused of wrongful use of an illegal drug based solely upon the results of a urinalysis test where the

evidence does not meet the standards announced by the U.S. Court of Appeals for the Armed Forces in *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000), and followed by this Court in *United States v. Barnes*, 53 M.J. 624 (N.M.Ct.Crim.App. 2000), *certificate for review filed*, 54 M.J. 225 (2000). Accordingly, we set aside the findings and sentence and dismiss the Charge.

A special court-martial composed of members convicted Private First Class [PFC] Stark, contrary to his pleas, of the wrongful use of cocaine in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The approved sentence consists of a bad-conduct discharge, confinement for 60 days, forfeiture of $616 pay per month for two months, and reduction to pay grade E-1. In this appeal, the appellant raises a single issue in which he challenges the sufficiency of the evidence. Based on both of the opinions in *Campbell*, we agree the evidence is legally insufficient.

Facts

PFC Stark enlisted in the U.S. Marine Corps on 12 January 1998, and he completed basic training as an honor graduate on 10 April 1998. On 11 April, he began a 10-day period of leave prior to reporting to the School of Infantry [SOI] at Camp Geiger, North Carolina. Upon reporting to SOI on 21 April, authorities there directed he submit to a urinalysis. He complied, and his urine specimen tested positive for the metabolite of cocaine. A single charge was later referred for trial by special court-martial.

The prosecution presented the testimony of the urinalysis coordinator, the urinalysis observer, and the Substance Abuse Noncommissioned Officer for the SOI. They testified as to the collection and observation procedures for the appellant's urinalysis. Although the observer did not specifically testify that he recalled observing the appellant, he did identify his signature in the urinalysis logbook for the appellant's sample. We are satisfied that the testimony of these witnesses established that the appellant's sample was collected and that the chain of custody to the laboratory was sound.

The Government also called Lieutenant Taylor, a biochemist and the Executive Officer of the Navy Drug Screening Laboratory in Jacksonville, Florida. He stated that the appellant's sample tested positive on two screening tests, as well as on a confirmatory gas chromatography/ mass spectrometry test at a level of 377 nanograms per milliliter [ng/ml] for benzoylecgonine [BZE], the metabolite of cocaine. He added that BZE is not naturally produced in the human body, and that cocaine must be ingested for it to be present in urine. He said his laboratory is regularly evaluated, that it has not been found to produce false positive results, and that it has never made an error.

LT Taylor further testified that in his experience, he had seen BZE readings as high as 60,000 ng/ml, that a person must ingest 20-25 milligrams of cocaine to "potentially" feel the effects of the drug, and that if a person ingested such an amount 24 hours before the urinalysis, it would result in a reading of about 5,000 ng/ml. He said that if a person with a reading of 377 ng/ml had ingested cocaine the day before the urinalysis, the amount ingested would consist of only 0.01 milligram of cocaine or an amount

about the size of a grain of sugar. He also said that if a person with such a reading had ingested cocaine three days before the urinalysis, he would have ingested about 1,258 milligrams (about 1.3 grams) of cocaine. He further testified that a person who ingested 0.01 milligrams of cocaine would probably not be aware of it, and that neither he nor his testing could tell exactly how the drug entered the body or whether the person knowingly ingested it.

The appellant testified in his defense and denied ever knowingly ingesting cocaine. He said that while he was on leave, he attended two parties, one on 15 April 1998, and the other on 18 April 1998, where he ate food and drank alcoholic beverages, but felt nothing other than the effects of alcohol. He did not think that anyone at those parties placed anything into his drinks. He was at a loss to explain how the BZE became present in his urine. Other witnesses testified for the defense as to the appellant's good military character, his honesty, and his total surprise upon hearing the results of the urinalysis. The prosecution presented no rebuttal evidence.

Discussion

Prior to *Campbell,* the trier of fact could draw a permissive inference of wrongful drug use based on a positive urinalysis. *United States v. Bond,* 46 M.J. 86, 89-90 (1997); *United States v. Pabon,* 42 M.J. 404, 406-07 (1995). In *Campbell,* however, the Court stated that the "prosecution cannot rely solely on the presence in the body of the drug or its constituent elements." *Campbell*, 50 M.J. at 160. It further held that where the prosecution intends to rely on the inference, the Government must "establish the reliability of the testing methodology and explain the significance of the results of the test of the accused's

sample." *Id.* This is normally done through the testimony of an expert witness that must show three things:

> (1) that the metabolite is not naturally produced by the body or any substance other than the drug in question;
>
> (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have experienced the physical and psychological effects of the drug; and
>
> (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample. *Id.*

Although the Court in *Campbell* stated that it was not creating new law,[1] its language modified the circumstances upon which the Government may rely upon a permissive inference. After *Campbell*, without other evidence, it appears the prosecution must normally sustain its burden to explain the significance of the test results by establishing the three factors listed above.[2]

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[1] *Campbell*, 50 M.J. at 161 n.2.

[2] Regarding the second factor, we believe the argument made in a recent article to be well-taken:

> *Campbell*'s second prong requiring the Government to prove that the accused experienced the effects of the drug is absolutely irrelevant to the guilt or innocence of the accused charged with wrongful drug use. If a member of the armed forces intentionally or knowingly uses cocaine, but for whatever reason, experiences no effects, he is still guilty of the offense. Likewise, if a servicemember's

In this case, the prosecution established the first and third factors. LT Taylor testified that BZE does not naturally occur in the body and that the testing methodology was reliable. However, it did not present evidence that the cutoff level of 100 ng/ml for BZE and the reported concentration of 377 ng/ml for BZE were high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that PFC Stark would have experienced the physical and psychological effects of the cocaine. From LT Taylor's testimony, this would all hinge on when the appellant ingested cocaine and how much he ingested. The testing methodology cannot answer such questions. Without having such facts, LT Taylor was not able to opine whether or not a person with a result of 377 ng/ml of BZE in his urine knowingly ingested cocaine or actually felt the effects of it.

Without evidence on the second factor or proof of other circumstances to show knowing ingestion, we conclude that the evidence was legally insufficient to prove the appellant's guilt of the wrongful use of cocaine. *Barnes*, 53 M.J. at 628.

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drink is spiked with cocaine and he in fact does feel the effects of the drug, he is still not guilty of the offense. The CAAF's premise in *Campbell* that suggests a person who experiences the effects of the drug is more likely to be guilty makes no sense. Nor does it help discount unknowing ingestion. Under the CAAF's rationale, Article 112a criminalizes the "high" and not the wrongful use.

LCDR David Berger, JAGC, USN, and Capt John Deaton, USMC, *Campbell and Its Progeny: The Death of the Urinalysis Case*, Vol. XLVII Nav.L.Rev. 1, 55 (2000). Although we believe the above argument is well-taken, we nonetheless are still bound to follow the precedent of our superior court. *United States v. Kelly*, 45 M.J. 259 (1996); *United States v. Allbery*, 44 M.J. 226 (1996).

Conclusion

The findings and sentence are set aside, and the Charge and Specification are dismissed.

PRICE, Judge (concurring):

I concur reluctantly. I do so reluctantly because I believe that the binding decision of our superior court in *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000), raises serious questions concerning the law of urinalysis in the military. *See United States v. Phillips*, 53 M.J. 758 (A.F.Ct.Crim.App. 2000)(Young, C.J., concurring); Lieutenant Commander David A. Berger, JAGC, USN and Captain John E. Deaton, USMC, *Campbell and its Progeny: The Death of the Urinalysis Case*, Vol. XLVII Nav. L. Rev. 1 (2000).

Although the Manual for Courts-Martial and applicable case law have consistently held that there are two elements of the offense of wrongful use of drugs under Article 112a, UCMJ, the *Campbell* decision effectively adds a third element, at least in cases where the Government's case-in-chief is rooted exclusively in a positive urinalysis result. I read the new three-prong test for the prosecution's expert testimony to now require proof beyond a reasonable doubt that the accused "experienced the physical and psychological effects of the drug." *Campbell*, 50 M.J. at 160. Thus, for such prosecutions, the elements are: (1) that the accused used a controlled substance; (2) that the use by the accused was wrongful; and (3) that the accused experienced the physical and psychological effects of the drug.

I confess that I do not understand the logical relevance of this additional element. I will use a simple hypothetical to illustrate. If a servicemember wrongfully smokes a cigarette knowing that it contains marijuana, the offense is complete. If he feels the effects of the use, he is no more culpable than without such sensation. If he doesn't, he is no less culpable[1]

Notwithstanding its logical weaknesses, *Campbell* is clearly the "law of the land" for urinalysis-based military prosecutions of wrongful use of drugs. That being the case, I suggest that it is time for the Secretary of the Navy to consider making appropriate changes in Chapter One of the Manual of the Judge Advocate General. Citing the *Campbell* decision, such a revision should make it clear that there are three elements for such a prosecution and should provide helpful guidance to commanders in deciding when to refer a charge to a court-martial and when to dispose of it through some alternative means.

ANDERSON, Judge (*dubitante*):

For the reasons expressed in my separate opinion in *United States v. Barnes*, 53 M.J. 624, 628-30 (N.M.Ct.Crim.App. 2000), I acquiesce in the result.

For the Court

R.H. TROIDL
Clerk of Court

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[1] The presence of deleterious effects on the user's body may be a relevant point in aggravation. The absence of such effects may be a relevant point in extenuation and mitigation. See RULE FOR COURTS-MARTIAL 1001, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

APPENDIX S

U.S. COURT OF APPEALS FOR THE ARMED FORCES

2001 CAAF LEXIS 811

No. 01-5010

Crim.App. No. 99 00823

Terrence D.L. STERNE
U.S. Marine Corps, *Appellee*

v.

United States, *Appellant*

Decided July 2, 2001

Opinion:

On consideration of the certified issue,* in light of United States v. Green, No. 00-0268, __ MJ __ (2001), we answer the certified issue in the affirmative. Accordingly, it is ordered that the decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further consideration in light of Green.

*WHETHER THE LOWER COURT ERRED IN FINDING THE EVIDENCE LEGALLY INSUFFICIENT TO PERMIT THE FACTFINDER TO INFER THE ACCUSED'S KNOWING AND WRONGFUL USE OF MARIJUANA AND METHAMPHETAMINE WHERE UNITED STATES V. CAMPBELL STATED IT DID NOT CREATE NEW LAW AND WHERE THE EVIDENCE PRESENTED AT TRIAL WAS AT LEAST THE SAME QUANTUM OF EVIDENCE THIS COURT PREVIOUSLY FOUND LEGALLY SUFFICIENT IN NUMEROUS PRE-CAMPBELL CASES.

DISSENT:

GIERKE, Judge (dissenting): I dissent from the order of the Court.

DATE: 26 March 1999

FOR THE COURT:

JOSEPH A. NEURAUTER
Clerk of Court

APPENDIX T

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

CHARLES Wm. DORMAN R. B. LEO
K.J. NAUGLE

UNITED STATES

v.

Terrence D.L. STERNE
Corporal (E-4), U.S. Marine Corps

NMCM 99 00823 Decided 16 June 2000

Sentence adjudged 19 July 1998. Military Judge: K.B. Martin. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters Battalion, Marine Corps Air Ground Combat Center, Twentynine Palms, CA.

Maj DALE E. ANDERSON, JAGC, USN, Appellate Defense Counsel
LCDR PHILIP SUNDEL, USNR, Appellate Government Counsel

PER CURIAM:

At his special court-martial the appellant was convicted, contrary to his pleas, of the wrongful use of marijuana and

methamphetamine. The appellant's offenses violated Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The officers and enlisted members of his court sentenced the appellant to reduction to pay grade E-1, restriction to the barracks for two months, confinement for three months, and a bad-conduct discharge. The convening authority approved the sentence.

We have carefully reviewed the record of trial, the appellant's assignment of error, and the Government's response. Following our review pursuant to Articles 59(a) and 66(c), UCMJ, we find error that materially prejudices the appellant's substantial rights.

Legal and Factual Sufficiency

In his sole assignment of error, the appellant challenges the legal and factually sufficiency of the evidence in support of his conviction. In support of his position, the appellant relies upon *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000). Based upon our understanding of the *Campbell* decision, we are compelled to agree with the appellant that the evidence is legally insufficient in this case.

Facts. The appellant was attached to Headquarters Battalion, Marine Corps Air Ground Combat Center, Twentynine Palms, California. On 8 January 1998 he responded to a call for a random command urinalysis screening and provided a urine sample. Shortly thereafter, the Navy Drug Screening Laboratory [NDSL] in San Diego, California, reported a positive result of that test for THC, indicative of the use of marijuana. When the command learned the results of that test, the appellant was asked to provide another urine sample. The appellant

executed a consent form and provided a second urine sample on 21 January 1998. The NDSL reported that sample positive for methamphetamine.

The Government presented the testimonies of the program coordinators on the days the appellant's urine samples were collected. The Government also presented the testimonies of the individuals who observed the appellant provide the samples. Finally, Dr. Robert Czarny, a chemist from the NDSL where the urine was tested, testified to the laboratory procedures used to test the samples and that the appellant's first urine sample tested positive for marijuana and the second urine sample tested positive for the presence of methamphetamine. Through this evidence, the Government established that the appellant's urine samples were properly collected and that the results of the testing procedures in the NDSL were reliable.

In fact, the appellant's urine sample of 8 January 1998 tested positive on three separate tests conducted by the NDSL. The first two tests were screening tests using a radio-immunoassay procedure. Following both of those tests resulting in a positive reading, a confirmatory test was performed using the gas chromatography/mass spectrometry [GC/MS] test. This confirmatory test revealed a reading of 23 nanograms of THC per milliliter. This was above the cut-off level of 15 nanograms. The chemist further testified that THC does not naturally occur in the human body.

The appellant's urine sample of 21 January 1998 tested positive on four separate tests conducted by the NDSL. The first two tests were screening tests using a radio-immunoassay procedure. After both of those tests resulted

in positive readings, two confirmatory tests were performed using the gas chromatography/mass spectrometry [GC/MS] test. The first confirmatory test revealed a reading of 978 nanograms of methamphetamine per milliliter. This was well above the cut-off level of 500 nanograms. The chemist further testified that methamphetamine does not naturally occur in the human body.

During cross-examination, the chemist acknowledged that readings of 23 nanograms of THC and 978 nanograms of methamphetamine were not high enough to enable him to say that the individual would have know that he had ingested the drugs. Both readings were well below the "average" readings the chemist usually saw with these two drugs.

The appellant testified that he did not use either marijuana or methamphetamine. He also provided evidence that he had four to seven days advance notice of the 8 January 1998 random test. Additionally, the appellant was confined between 16-20 January on a civilian warrant. He presented testimony from those who were with him upon his release, that he did not use any drugs the night of 20 January, after his release from jail. He also provided convincing evidence that his urine sample of 21 January had been improperly labeled, and that it was relabeled with his consent on 22 January 1998. He provided no explanation for how the illegal substances came to be in his urine. He suggested, through argument, that perhaps his ex-wife had spiked his food or drink. Her motivation may have been to obtain custody of their son. Record at 592. The appellant also presented evidence concerning his ex-wife's use of drugs. Finally, the appellant presented evidence of his good military character and veracity.

Discussion. The test for legal sufficiency requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In this case there are but two elements: that the appellant used a controlled substance, and that the use was wrongful. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 37b(2). Both elements, however, contain a knowledge requirement. *United States v. Mance*, 26 M.J. 244, 253-254 (C.M.A. 1988).

> Knowledge of the presence of a controlled substance is a required component of use. Knowledge of the presence of a controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge.

MCM, Part IV, ¶ 37c(10). The recent decision of our superior court, in *Campbell*, significantly modified the conditions under which the Government may rely upon this permissive inference.

Although *Campbell* dealt with lysergic acid diethylamide and the reliability of the testing methodology employed in that case, we do not believe that *Campbell* can be limited to its facts. Prior to *Campbell,* it was well

established that the trier of fact could draw a permissive inference of wrongful drug use based on a positive urinalysis. *United States v. Pabon*, 42 M.J. 404, 405-06 (1995). *Campbell*, however, provides that the "prosecution cannot rely solely on the presence in the body of the drug or its constituent elements." *Campbell*, 50 M.J. at 160. It further provides that where the prosecution intends to rely upon this inference, the Government must "establish the reliability of the testing methodology and explain the significance of the results of the test of the accused's sample." *Id.* This is normally done through the testimony of an expert witness. When such a witness is called:

> The prosecution's expert testimony must show: (1) that the "metabolite" is "not naturally produced by the body" or any substance other than the drug in question . . . (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug," . . . and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.

Id. (citations and internal quotes omitted).

In the appellant's case, the Government adequately established that THC and methamphetamine do not naturally occur in the human body, and that the results of both urine tests were reliable. We find, however, that the

testimony of Dr. Czarny did not establish that the cutoff level and the appellant's nanogram level were sufficient to discount unknowing use and to indicate that the appellant experienced the physical and psychological effects of the drug. Additionally, no other evidence presented was sufficient to permit the prosecution to rely upon the inference. *See Campbell*, 52 M.J. at 388-389. Since the prosecution is not entitled to rely upon the presumption of knowing use in this case, and since it did not present any other direct or circumstantial evidence of knowing use, we find that the evidence is legally insufficient to prove the first element of the offense. *See United States v. Barnes*, ___ M.J. ___, No. 94 01927 (N.M.Ct.Crim.App. 31 May 2000).

Conclusion

The findings and sentence are set aside. The Charge, Additional Charge, and all Specifications are dismissed. All rights and privileges the appellant lost due to this conviction shall be restored to him. This case is returned to the Judge Advocate General of the Navy for appropriate disposition.

For the Court

ROBERT H. TROIDL
Clerk of Court

APPENDIX U

37. Article 112a—Wrongful use, possession, etc., of controlled substances

a. *Text.*

"(a) Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.

(b) The substances referred to in subsection (a) are the following:

(1) opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana, and any compound or derivative of any such substance.

(2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this article.

(3) Any other substance not specified in clause (1) or contained on a list prescribed by the President under clause (2) that is listed in Schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

b. *Elements.*

...(2) *Wrongful use of a controlled substance.*

(a) That the accused used a controlled substance; and

(b) That the use by the accused was wrongful.

c. *Explanation.*

...(5) *Wrongfulness.* To be punishable under Article 112a, possession, use, distribution, introduction, or manufacture of a controlled substance must be wrongful. Possession, use, distribution, introduction, or manufacture of a controlled substance is wrongful if it is without legal justification or authorization. Possession, distribution, introduction, or manufacture of a controlled substance is not wrongful if such act or acts are: (A) done pursuant to legitimate law enforcement activities (for example, an informant who receives drugs as part of an undercover operation is not in wrongful possession); (B) done by authorized personnel in the performance of medical duties; or (C) without knowledge of the contraband nature of the substance (for example, a person who possess cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine). Possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of

proof is upon the United States to establish that the use, possession, distribution, manufacture, or introduction was wrongful.

...(10) *Use.* "Use" means to inject, injest, inhale, or otherwise introduce into the human body, any controlled substance. Knowledge of the presence of the controlled substance. is a required component of use. Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge.